



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0066(P)

Decided without a hearing on: 4 December 2020

Before

**JUDGE SOPHIE BUCKLEY
MARION SAUNDERS
EMMA YATES**

Between

SADDAT ABID

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

MODE OF HEARING

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules. The code for the form of remote hearing is P.

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50850520 of 10 January 2020 which held that Kirklees Metropolitan Council ('the Council') was entitled to rely on s 40(2) (personal data), s 41 (information provided in confidence) and s 42 (legal professional privilege) of the Freedom of Information Act 2002 (FOIA) and that it did not hold any further information within the scope of the request.
2. The Commissioner found that the Council did not comply with s 10(1) FOIA. She did not require the Council to take any steps.

Factual background to the appeal

3. The request relates to a dispute between a school and a building company in relation to some building works at the school in about 2015. The works and the dispute resulted in the payment of a significant sum of public money to the building company.

Request and Decision Notice

The Request

4. Mr. Abid made the request which is the subject of this appeal on 1 January 2019:

Under Freedom of Information act, can I please request in electronic format:

1. Details of what project methodology / project management frame-work was used and copies of all relevant project management documents.
2. Names of all consultants including contractors hired for purpose of the school extension, their qualifications and their CVs with personal details removed. If it helps, anonymous CVs are acceptable so for instance Bob Smith would be BS and their role as a Building Manager.
3. Copies of Professional Indemnity & Public Liability Insurances for all consultants hired by the school and its contractors/sub-contractors such as Bardsey Building Contractors Limited.
4. Copies of all email (internal or external) or written letter correspondences relating to Bardsey Building Contractors Limited, its Directors or relating to the school extension whether sent or received. For clarity, these are all correspondence from commencement of project to present day.
5. Copies of all Minutes of Meetings relating to Bardsey Building Contractors Limited for the school extension.
6. Copies of school staffs' CVs involved in the project, their respectively roles and responsibilities.
7. Copies of CVs for the school governors involved in school extension project and their roles within the project.

8. Copy of a project brief briefly describing what led to justification of this project.
9. Copy of complaint received from Bardsey Building Contractors Limited.
10. Electronic copy of Adjudicator's decision along with supporting documentations submitted by both parties.
11. Copies of Legal advice received by the school.
12. Copies of all invoices relating to the school extension, schedule of payment confirming the amount, date and invoice number being paid.
13. Details of Interests Register of all personnel involved with this project.
14. Copies of project progress reports issued by Bardsey or the school to its stakeholders. Photos showing areas that led to the dispute
15. Any other relevant documentation relating to the school extension that has not been covered above.

The Response

5. The Council requested clarification of the date of the project and Mr. Abid stated that it was, to this knowledge, 2013. The Council provided a partial response on 9 May 2019. It stated that it did not hold any information in relation to parts 1, 2, 3, 5, 6, 7, 8, 13, 14, 15 and 16.
6. On 13 June 2019 the Council provided a final response. It stated that it did not hold the information requested in part 11. It disclosed the information requested in parts 9 and 12.
7. In relation to part 4 the Council disclosed some information. It redacted some information relying on s 40(2) (personal information) and withheld one email exchange relying on s 42 (legal professional privilege).
8. In relation to part 10 the Council stated that it held a copy of the adjudicator's report and two witness statements created for the purposes of the adjudication but withheld it relying on s 32(2)(a) and (b) (Court records).
9. Mr Abid had complained to the Council's monitoring officer about the delay in responding to his request in May 2019. This was treated as a request for an internal review. By letter dated 14 June 2019 the Council upheld the claimant's review on the grounds that the request was not complied with within the statutory time limit.
10. During the investigation by the Commissioner the Council provided the following further information about the reasons for withholding the information:
 - 10.1. The Council set out a description of the information which amounted to personal data and the individuals whose data it was (see p135.)
 - 10.2. It described the searches it had carried out before concluding that no further information was held (p138).

- 10.3. In relation to the Adjudicators report it relied instead on s 41 (information provided in confidence).
- 10.4. The Council identifies the specific document withheld as legal advice (pD168 of the closed bundle).

The Decision Notice

11. In a decision notice dated 10 January 2020 the Commissioner decided that the request was to be considered under FOIA and not the Environmental Information Regulations 2004 (EIR).

Information not held

12. The Commissioner found that the Council had carried out adequate and appropriate searches across relevant departments and, on the balance of probabilities, the Council did not hold any further information.

Personal information – s 40(2)

13. The Commissioner was satisfied that the withheld information was personal information on the basis that the information both relates to and identifies the individuals concerned.
14. The Commissioner accepted that the public has a legitimate interest in transparency about the building dispute which led to significant costs to the school. She accepted that the public had a legitimate interest in knowing what actions individuals representing the public bodies took which led to that situation. She concluded that disclosure was necessary in order to meet the legitimate interests of the public.
15. Taking account of the likelihood of harm and distress, the fact that not all details were in the public domain, and the reasonable expectations of the individuals involved, the Commissioner concluded that there was insufficient legitimate interest in disclosure to outweigh the data subjects' fundamental rights and freedoms. She concluded that disclosure would not be lawful and Council was entitled to withhold the information under s 40(2) FOIA.

Information provided in confidence – s 41

16. The Commissioner concluded that the information had the necessary quality of confidence and that it was imparted in circumstances importing an obligation of confidence. She concluded that disclosure would create a degree of detriment to the owners of the building company and to the school. It would therefore create an actionable breach of confidence if the Council were to disclose the information. The Commissioner considered whether a public interest defence would be available to an action for breach of confidence and

determined that the public interest in maintaining the exemption outweighed the public interest in the documents being disclosed.

Legal professional privilege – s 42

17. The Commissioner was satisfied that the small amount of information withheld under s 42 constituted communications between a legally qualified professional and their client for the dominant purpose of providing legal advice and that privilege had not been waived. She concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Grounds of Appeal

18. The Grounds of Appeal in essence are that:

Ground 1 – the Council held more information

- 18.1. The Commissioner's decision is based on the incorrect assumption that the Council had limited involvement. The Council made the payment to the builders and were aware of the dispute.
- 18.2. The search carried out by the Council was not accurate or comprehensive. Council employees, including the school's leadership team, the finance office and corporate standards were involved in the dispute. The Council provides IT infrastructure services, data storage facilities and email facilities to schools. The information would therefore be held within the Council's IT system.

Ground 2 – the Commissioner was wrong in its conclusions on s 40(2)

- 18.3. The request specifically asks for personal information to be omitted. The names of the directors of the building firm are already in the public domain on Companies House.
- 18.4. Some names were not redacted: this is either a contradiction or a breach by the Council.
- 18.5. Disclosure of names will not cause distress because of the Nolan principles.
- 18.6. It is unclear how distress could be caused to the building company or its directors.

Ground 3 – the Commissioner was wrong in its conclusions on s 41

- 18.7. An adjudicator's decision is comparable to a County Court decision. It has not been established that the parties entered into a confidential settlement.
- 18.8. The decision was revealed to the Council – a third party.
- 18.9. The exemption being maintained goes against the Nolan principles.

Ground 4 – the Commissioner was wrong in its conclusions on s 42

18.10. Legal professional privilege has been lost because of the detailed article in the press.

18.11. The Commissioner should have concluded that the public interest favoured disclosure under s 42 in any event because of the large amount of money involved, the significant number of people affected, the lack of transparency in the Council’s decisions and misrepresentation/selective disclosure of the advice given.

The Commissioner’s response

19. The Commissioner relies on the reasoning in the decision notice. The additional points that she makes are, in summary, as follows.

Ground 1 - Information not held

20. Even if the Council were responsible for the school’s IT/email systems it does not mean that the information is held by the Council under FOIA.

Ground 2 - Personal information

21. The appellant has not set out his reasons for asserting that this information is in the public domain.

Ground 3 – Confidential information

22. It is possible for information to retain the quality of confidence even if it is known to a limited number of individuals provided it has not been placed in the public domain.

Ground 4 - Legal professional privilege

23. The appellant has not indicated which information included in the article has resulted in a loss of privilege.

Evidence

24. We have read an open and a closed bundle of documents, which we have taken account of where relevant.

The scope of the appeal

25. The registrar made the following order on 21 October 2020:

- “9. Mr Abid has been provided with some of the information he requested; this appeal is about whether further information should be provided to him. Therefore, where Mr Abid’s position is that an unedited copy of a page provided to him should be made public, he must:
- 9.1 Provide a copy of that page to the Information Commissioner’s Office and the Tribunal;
 - 9.2 Explain what parts of the document he believes should be disclosed (or “all);
 - 9.3 Say why he says that particular information should be published under the Freedom of Information Act 2000; AND
 - 9.4 If the documents are more than 5 pages, he must provide the above in a PDF document, paginated and indexed (the bundle provided by the Information Commissioner’s Office is a good example of how to present such information to the Tribunal); AND
 - 9.5 The above must be with the Information Commissioner’s Office and the Tribunal no later than on 18 November 2020.
10. In addition to the above, each party will have an opportunity to make final written representations; any such representations must be with the other parties (unless rule 14 application is made) and the Tribunal no later than on 18 November 2020.”

26. Mr Abid did not provide anything to the tribunal in accordance with the above order, nor did any party make final written submissions. The tribunal considered whether this meant that Mr. Abid was not asking for an unedited copy of any redacted pages to be made public. We decided, in accordance with overriding objective, that it was not appropriate to assume that Mr. Abid had made that concession, and to determine, on the basis of the evidence and submissions before us, whether the Council was entitled to withhold any of the redacted information.

Legal framework

Whether information was held by the public authority

27. The question of whether information was held by the public authority at the date of the request is a matter to be determined on the balance of probabilities.

S 40 – personal data

28. The relevant parts of s 40 of FOIA provide:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if –
 - (a) It constitutes personal data which does not fall within subsection (1), and
 - (b) either the first, second or the third condition below is satisfied.

- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
- (a) would contravene any of the data protection principles, or..,

29. Personal data is defined in s 3(2) of the Data Protection Act 2018 (DPA) as:

Any information relating to an identified or identifiable living individual

30. Personal data must be processed 'lawfully and fairly' and one of the lawful bases of processing in article 6(1) must apply. The only potentially relevant basis here is article 6(1)(f):

Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.

31. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows:

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

S 41 - information provided in confidence

32. S 41 provides, so far as relevant:

S 41 - Information provided in confidence

(1) Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

33. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

33.1. Does the information have the necessary quality of confidence?

33.2. Was it imparted in circumstances importing an obligation of confidence?

33.3. Is there an unauthorised use to the detriment of the party communicating it?

34. The common law of confidence has developed in the light of Articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of 'private' information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.
35. S 41 is an absolute exemption, but a public interest defence is available to a breach of confidence claim. Accordingly there is an inbuilt balancing of the public interest in determining whether or not there is an actionable breach of confidence.

S 42 - legal professional privilege

36. Section 42(1) provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
37. For our purposes, information is exempt where (a) it satisfies the exemption in s 42(1) FOIA; and (b) "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". (See s 2(2)(b) FOIA - referred to here as the 'public interest test').
38. Legal professional privilege comprises two limbs, legal advice privilege and 'litigation privilege'. We are concerned in this appeal with legal advice privilege: confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance.
39. The rationale behind the principle of legal advice privilege is set out in the Supreme Court's decision in Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6) [2004] UKHL 48 ('Three Rivers (No 6)') at paragraph 34. After summarising the relevant authorities, Lord Scott said:

None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their

lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of Zuckerman's Civil Procedure (2003) where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.

40. Legal advice privilege also protects confidential communications to third parties, including employees that are not 'the client', that record, evidence, reproduce or otherwise reveal the legal advice. So a record of the privileged advice in the form of a summary of the advice would also be protected: The 'Good Luck' [1992] 2 Lloyd's Rep. 540; The 'Sagheera' [1997] 1 Lloyd's Rep. 160. In Three Rivers (no.5) it was held that legal advice privilege applies both to communications between the client and the legal advisor and documents evidencing such communications.
41. S 42 is a qualified exemption, so that the public interest test has to be applied. It is recognised that there is a significant 'in-built' interest in the maintenance of legal professional privilege (DBERR v O'Brien and Information Commissioner [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. The tribunal recognises that "although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption" (DCLG v IC and WR [2012] AACR 43 at [44]) and the weight will vary according to the specific facts of each case.
42. We adopt the approach as set out in DBERR v O'Brien and Information Commissioner:
...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.

The Task of the Tribunal

43. The tribunal's remit is governed by s 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

44. The issues we have to determine are as follows:

Whether further information is held

1. On the balance of probabilities does the Council hold any further information within the scope of the request.

Personal Data

2. Is the disputed information personal data?
3. Would the release of that information be lawful and fair?

Information provided in confidence

4. Was the information provided by a third party?
5. Would disclosure amount to an actionable breach of confidence in that:
 - 5.1 The information has the necessary quality of confidence, and
 - 5.2 It was imparted in circumstances importing an obligation of confidence, and
 - 5.3 There was an unauthorised use to the detriment of the party communicating it, or
 - 5.4 There is a misuse of 'private' information such that there would be an actionable breach of confidence in accordance with the common law developed in the light of the European Convention on Human Rights.
6. Would the public interest defence apply such that there would be no actionable breach of confidence?

Legal professional privilege

7. Does the information consist of confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance?
8. If so, does the public interest favour maintaining the exemption?

Discussion and conclusions

45. Mr. Abid makes reference to the Nolan principles on a number of occasions.

Whether further information is held

46. We accept the Council's assertion that, as this was a contract between the school and the construction company, the Council held little information. Mr. Abid is right that the Council made the payment and that it was aware of the dispute. The Council accepts that it became involved when the dispute arose between the school and the construction company and payment was required. At that point the Corporate Standards Team, senior managers in Finance and Education, the Chief Executive's Office and Internal Audit and a small amount of legal advice.

47. Having identified the departments that might hold information the Council asked the FOI coordinators to conduct searches for information falling within the scope of the request.

48. The Council has addressed its mind to the departments most likely to hold information and has instructed the relevant FOI coordinators to search for information. This is, in our view, a sufficiently thorough approach. We find that any information which is held by the school but accessible by the Council because the Council provides IT infrastructure services, data storage facilities and email facilities would not be held by the Council for the purposes of FOIA.

49. Taking into account the above, on the balance of probabilities we find that the Council does not hold any further information within the scope of the request.

Personal data

50. We deal firstly with the redactions relating to individuals' names, job titles, internal Council and mobile phone numbers, signatures, bank account details and hourly rates of pay, email addresses and reference numbers containing initials. This is clearly personal information. The Council has not redacted the names of individuals with public facing or senior roles at the Council.

51. There is a legitimate interest in transparency in relation to the handling of the dispute by the council and the school which led to a significant payment of public money. We do not accept that this includes any legitimate interest in the withheld information, i.e. in the names of individual junior employees or the name of the particular director of the building contractor, or in relation to the mobile phone numbers, signatures, bank account details and hourly rates of pay, email addresses and reference numbers etc.

52. If we had found that there was such a legitimate interest, we would have found that the disclosure of this particular personal information was not necessary to meet that legitimate interest. The identity of the individuals, other than that of

the senior individuals already disclosed, is not relevant and does not contribute to an understanding of the action taken by the Council or the school. It is not necessary to know the identity of the particular director of the construction company who said a particular thing or took a particular action. Nor does the other personal information such as contact details, bank details etc. contribute to that legitimate interest. The information already disclosed, in redacted form, meets the legitimate interest as much as it would in unredacted form.

53. If we had needed to go on to consider the balance between the legitimate interest in disclosure and the data subjects' interests or fundamental rights and freedoms we would have taken account of the following. We find that all the individuals would have had a reasonable expectation that information such as mobile phone numbers, bank account details, individual email addresses etc. would not be made public. We accept that some information about the dispute is already in the public domain. This is highly unlikely to include these specific details, and there is no evidence before us upon which we could base a conclusion that any of this information was already in the public domain.
54. In relation to names, we find that more junior employees within the school and the council not in outward facing roles would have a reasonable expectation that their names would not be made public in this context. Junior employees are accountable to the public authority, not to the public for their actions. In relation to the names of the individual directors of the building contractor, in the context of the particular correspondence which relates primarily to a complaint made to the Council, we find that they would have had a reasonable expectation that their individual names would not be released.
55. Although it is correct that the directors of the company could be identified using the information already in the public domain combined with the information on Companies House, this would not identify which director is referred to in the detailed accounts of conversations/actions in the redacted documentation.
56. Although there is no indication of the views of the individuals involved, we agree with the Commissioner that the context of the dispute means that disclosure is likely to cause some distress to the individuals involved. Further, given the nature of some of the information such as bank accounts and individual email addresses, we accept that distress would be caused by the publication of these details. The Nolan principles do not, in our view, mean that junior employees of public bodies should expect that personal information of this nature will be disclosed.
57. We conclude accordingly that the Council is entitled to withhold the individuals' names, job titles, internal Council and mobile phone numbers,

signatures, bank account details and hourly rates of pay, email addresses and reference numbers containing initials.

58. We turn now to the redaction of detailed accounts of conversations and encounters between the owners of the construction firm and others. We have concluded that this is a reference to an email from the building contractor to the Council dated 6 March 2015 at 13:50 which appears at pages C394-C395 of the closed bundle.
59. We have had no specific submissions on this particular redaction from any of the parties. It is not explicitly dealt with by the Commissioner, although it is of a different nature to the other redactions. We have considered whether or not the redacted information is personal information. It describes actions taken, opinions expressed and particular statements and conversations of the individual directors of the construction company. We take note of the fact that the individuals were acting in a professional capacity at the time, but that the redacted parts relate specifically to particular actions of those individuals. We find that the information, by reason of its content, purpose and effect is linked to particular individual and is therefore information relating to that individual. On balance, we decide that it is personal information.
60. The legitimate interest in this case relates primarily to the actions of the public authorities involved: the school and the Council. Because of the payment of public money, we accept that there is also a public interest in the actions of the construction company which formed the background to the dispute. This extends to some extent to the actions of the individuals at the construction company, again because it forms part of the background to the dispute. We accept that there is a legitimate interest in the redacted information on pages C394-C395.
61. We do not accept that disclosure is necessary for that legitimate interest. Significant information has already been disclosed as a result of this request. There is very limited additional information in the redacted sections, and there is nothing which would add anything of significance to the public understanding of the situation or to transparency or accountability in relation to the school and the Council for the spending of public money.
62. Had we needed to consider the balance of public interest we would have concluded that the above interests were overridden by the interests or fundamental rights and freedoms of the data subject. In terms of the reasonable expectations of the individuals, this information was provided in the context of a complaint to the Council and an attempt to resolve a contractual dispute. It is clear to us that the individuals would not have expected these details to be disclosed more widely. Further, emotions were obviously running fairly high and we accept that the individuals would be caused distress by the disclosure many years later of the Council of information which, we find, they would

have expected to be treated in confidence. There is no evidence before us that any of this specific information is in the public domain.

63. In conclusion, we hold that the Council was entitled to withhold the redacted information under s 40(2) because it is personal information and disclosure would contravene the data protection principle that personal data shall be processed lawfully and fairly.

Confidential information

64. The decision of an adjudicator in a construction adjudication is not akin to a County Court judgment. County Court proceedings are public and their judgments are published as a matter of course. The issue in this case is not whether the decision or statements formed part of a confidential settlement of a court case. We must apply the tests set out above to determine whether or not there is an actionable breach of confidence.
65. This information consists of the adjudicator's decision and witness statements provided to the adjudicator for the adjudication. The decision was provided to the Council by the construction company. Although the Commissioner proceeded on the basis that the statements were also provided by the construction company, it is apparent from the closed bundle that they were provided to the Council by the school. All the information was provided to the Council by a third party.
66. We conclude that the information has the necessary quality of confidence. It is not generally accessible to the public even though certain limited information on specific elements of the decision have been reported in the media based on, according to the press report 'a leaked dossier'. The mere fact that it was shared with the Council in these circumstances does not mean that the information is no longer confidential.
67. We find that the information clearly possesses sufficient significance and value to be classed as more than trivial. Taking into account the nature of the documents, considered in further detail below, we find that a reasonable person would regard this information as confidential.
68. Although neither the school nor the construction company expressly stated that they were supplying the information to the Council in confidence, we find that the guidance and statutory framework surrounding construction adjudications set out in the Decision Notice reflects a usual practice in the industry of treating such adjudications as confidential. On this basis we infer that the parties treated the process as confidential, even though we do not know if the TeCSA rules applied. Taking into account the circumstances in which information of this nature was supplied i.e. in the context of a live

dispute, we infer that it was imparted in circumstances importing an obligation of in confidence.

69. We are satisfied that disclosure would cause detriment to the school and the construction company. We consider that disclosure to the world at large of detailed information on the evidence provided to an adjudicator and the detailed conclusions of that adjudicator, where those parties had considered it to be confidential, is sufficient to amount to a detriment. We agree with the Commissioner that neither party would expect these matters to be put into the public domain by the Council some years later.
70. A public interest balance is inherent in the question of whether or not there is an actionable breach of confidence.
71. We accept that there is a public interest in transparency in relation to the circumstances which led to the payment of a significant sum of public money to the construction company. This public interest is reflected in the Nolan Principles that are referred to by Mr Abid, but the Principles do not create any overriding interest in disclosure.
72. The witness statements contain information about the school's actions which would contribute to a certain extent to a greater or more detailed public understanding about how the dispute arose. This public interest is diminished to some extent by the fact that other information about the dispute is already in the public domain and that further information has been provided in response to this request. In addition, the information relates to a historic dispute in 2013, which reduces the public interest to some extent. We also note that the school, as the public authority which was the main party to the dispute, is likely to hold more relevant information which could be requested through FOIA.
73. We agree with the Commissioner that the specific information included in the decision is of a technical nature and relates primarily to details of what work was carried out and what payments were due and would not add to broader transparency as to the actions of the Council. There is nothing in the documents which suggests that the public has been misled or any evidence that any wrongdoing is being covered up.
74. We find that there is a general public interest in maintaining parties' confidence in the confidentiality of adjudication decisions and evidence where, as we have inferred here, the parties regarded the process as confidential. We think that there is a strong public interest in not undermining the adjudication process. Further, we agree with the Commissioner that there is a public interest in parties to a contractual dispute, where the Council is involved to some extent, feeling able to share confidential information about an adjudication with the Council. We accept that disclosure of this information

might lead to a degree of reluctance to provide this sort of information in the future.

75. Taking into account all the above, we find that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Legal professional privilege

76. We understand the document withheld under this exemption is the email from the Council's senior legal officer dated 9 April 2015 at 17.57 which appears at p D618 of the closed bundle. We have reviewed the document. We accept that it is a confidential communication between lawyer and client for the purpose of giving or receiving legal advice. There is a strong inbuilt interest in this exemption, because of the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. We accept that this weight is reduced to some extent because the particular issue on which advice was sought was no longer live at the date of the request.
77. We accept that there is a public interest in transparency in relation to the circumstances which led to the payment of a significant sum of public money to the construction company. We do not accept that the disclosure of the particular documents covered by LPP will contribute anything of significance to that particular public interest. We accept that there is a general public interest in transparency of any documents held by the Council.
78. We do not accept that the public interest in disclosure is sufficient to outweigh the strong inherent interest in maintaining the exemption, even though this is reduced slightly because the particular issue was not live at the date of the request.

Conclusion

79. For the reasons set out above the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 21 December 2020

Date Promulgated: 22 December 2020