



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

Case No. EA/2010/0120

**ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50267900
Dated 9 June 2010**

Appellant: Stephen West

Respondents: Information Commissioner

Date of hearing: 15 October 2010

Date of decision: 25 October 2010

Before

HH Judge Shanks

Ivan Wilson

Darryl Stephenson

Subject areas covered:

Freedom of Information Act 2000

Legal professional privilege s.42

Environmental Information Regulations 2004

Exceptions, Regs 12(4) and (5)

Legal professional privilege (5)(b)

Cases referred to:

DBERR v O'Brien [2009] EWHC 164

Decision

For the reasons set out below the appeal is dismissed.

Reasons for Decision

Background facts

1. In February 1988 the London Borough of Bexley transferred part of its council housing stock (approximately 4,000 dwellings) to the Orbit Bexley Housing Association. The Appellant, Stephen West, is a member of the Orbit Bexley Housing Association Independent Leaseholders' Group. The members of the group object to having to pay service charges to the housing association for the cost of the maintenance of roads and footpaths within housing estates because, they say, such maintenance was and remains the legal responsibility of the Council notwithstanding any transfer.

2. On 28 January 2009 Mr West wrote to a councillor stating that the leaseholders' group wanted his support in backing their right to challenge the legality of the "stock transfer agreement" and to overturn it. The Council referred the matter to a barrister for advice which they received in April 2009. At a meeting on 20 June 2009 attended by the Council and the housing association Mr West was told that such advice had been obtained. On 22 June 2009 he asked to be provided with a copy of the advice.
3. On 24 June 2009 the Council refused to comply with that request, citing section 42 of the Freedom of Information Act 2000, which, subject to the public interest balance, protects material which is subject to legal professional privilege. On 26 June 2009 Mr West sought an internal review of that decision. While that review was still going on he sent the Council an email dated 29 June 2009 in which he expressed an intention to bring a test case before the Leasehold Valuation Tribunal, and stated that if the Council were to win the case the failure to disclose the advice would prevent them being able to recover their costs. On 17 August 2009 the Council upheld its decision not to provide the advice on the basis of section 42 of the 2000 Act.
4. On 7 September 2009 Mr West complained to the Information Commissioner about how his request had been handled. In his complaint he stated that the leaseholders' group had submitted a preliminary report to the LVT

... requesting if we have a bona fide case to bring to the [LVT] against our former landlord Bexley Council and our current landlord Orbit South. Our Group is challenging the decision to sell on the land, grounds, highways ... which we claim to be public amenities
5. In a decision notice dated 9 June 2010 the Commissioner ruled that the information in question was not covered by the Freedom of Information Act 2000 but was covered by the Environmental Information Regulations 2004 and that the Council could rely on regulation 12(5)(b) (which is analogous, although not identical, to section 42) to resist disclosure of the advice. Mr West has appealed against that decision notice to this Tribunal.

The appeal

6. On 5 August 2010 the Tribunal gave directions that the Commissioner was to provide Mr West with copies of the submissions made to the Commissioner by the Council during his investigation, which was duly done by the Commissioner. (The Tribunal would observe that in our view it would have been better if Mr West had been provided with these submissions (redacted if necessary) at the time they were made to the Commissioner). The Tribunal also directed that Mr West and the Commissioner should serve on the other any further evidence and/or submissions on which they proposed to rely by 10 September and 1 October 2010 respectively with a view to an oral hearing (specifically requested in Mr West's notice of appeal) on 15 October 2010. On 13 October both parties indicated to the Tribunal that they no longer wanted an oral hearing and applied for an extension of time for the service of evidence and submissions. The Tribunal rejected that application and we met as arranged on 15 October and decided the outcome of the appeal on the basis of such material as had already been provided to us. Had arrangements not already been made for a room and had it not been too late to cancel the booking we could and would have deliberated in this case by telephone at considerably less cost to the public purse. We hope that the message goes out from all this that parties cannot simply re-organize the timetable for their own convenience and that they should give some thought to whether they really need an oral hearing before ticking the appropriate box in the notice of appeal form and should in any event keep the matter under review and inform the Tribunal at the earliest opportunity if positions change. We turn from procedure to substance.
7. Mr West's appeal is based on two main points: first, he says that although he accepts that "legal advice privilege" may apply to the withheld information, "litigation privilege" does not; and second, he says that the Commissioner failed to weigh the public interests properly and did not give sufficient weight to the arguments in favour of disclosure. He does not take issue with the Commissioner's conclusion that the Environmental Information Regulations 2004 and not the Freedom of Information Act 2000 apply in this case. Although we ourselves were not entirely sure about that conclusion, in the absence of any challenge to it we have proceeded on the basis that it is correct. Nor are we sure that the ambit of

regulation 12(5)(b) is exactly the same as that of section 42 but unfortunately, although the Tribunal expressly directed that the Commissioner should attend the hearing prepared to deal with that issue, we have not had any assistance on the point.

8. We consider first the applicability of regulation 12(5)(b) to the withheld information (which includes consideration of the point raised by Mr West as to the nature of any legal professional privilege) and then the public interest.

Regulation 12(5)(b)

9. So far as relevant regulation 12 provides as follows:

(5) ... 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 ...

In contrast to section 42 which applies to all information in respect of which a claim for legal professional privilege could be maintained (such privilege can be maintained regardless of whether litigation is in prospect or not and regardless of the effect of disclosure of the specific material in question), regulation 12(5)(b) only applies if the disclosure of the information would adversely affect one of the identified interests (obviously “the course of justice” is the relevant one in this case). Although differently constituted Tribunals appear to have treated the two provisions as invariably giving rise to the same result, we are not sure that that is necessarily so in every case; for example, it may be arguable that regulation 12(5)(b) cannot apply in a case where there is no prospect of litigation and pure “legal advice privilege” is relied on and/or that some consideration must be given in each case to the effect of disclosure of the particular piece of information in question, albeit that such effect may be at the general level.

10. On the facts of this case, however, and regardless of such arguments, we are satisfied that “the course of justice” would have been adversely affected by disclosure of the legal advice obtained by the Council. In view of the letter from Mr West to which we refer at paragraph 2 above and having seen the terms of the advice itself (on a “closed” basis), we are satisfied that it would have been covered by “litigation privilege” (ie that it was obtained in contemplation of litigation against the Council which was reasonably in prospect) and we are further satisfied that such litigation was still in prospect in June 2009 when Mr West asked to see the advice and sent the email to which we refer at paragraph 3 above. The disclosure of legal advice obtained by one side to prospective litigation without corresponding disclosure the other way would clearly be unfair and tend to undermine the course of justice in the particular case.
11. Mr West says in his notice of appeal that the only litigation that could arise would be between the leaseholders’ group and the housing association and that the only basis for recourse against the Council would be a judicial review which, he says, is “not a litigious process sufficient to assert [legal professional privilege]”. We reject both those points: it is clear from the background we have recited that the leaseholders’ group were contemplating litigation against the Council; and legal professional privilege applies as much to judicial review proceedings as to any other type of litigation.

Public interest

12. Even if regulation 12(5) applies the information must still be disclosed under the regulations unless “... in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information”, there being a presumption in favour of disclosure.¹

Public interest in maintaining the exception

13. As we see it, the factors which were relevant to the weight of the public interest in maintaining the exception in this case were as follows:

¹ See regulations 12(1)(b) and 12(2)

- (1) There is a strong built-in public interest in upholding legal professional privilege generally, as has been accepted by the Tribunal on many occasions and upheld by the High Court (albeit in the context of section 42);²
- (2) That public interest reflects the public interest in protecting the ability of a public authority (like any other person) to communicate candidly and freely with its legal advisors and to obtain fully informed advice and make its decisions on the basis of such legal advice;
- (3) The advice in this case had been obtained only shortly before the request for information;
- (4) It related to a very “live” dispute and had been obtained, as we have found, in contemplation of litigation which was still in prospect at the time of the request;
- (5) If it had been disclosed, one side to the dispute would have had access to legal advice obtained by the other without reciprocal rights the other way, which would have been unfair.

14. Mr West makes two points in relation to the weight of the public interest in maintaining the exception at paragraphs 2.2.5 and 2.2.6 of his notice of appeal. First, he says (as we understand it) that no specific adverse effect has been identified as likely to flow from disclosure of the particular advice in question. That is correct and to that extent the weight of the public interest in maintaining the exception is reduced or not increased. Second, he says that the issue of candour only arises in criminal litigation and that the Council had presumably already communicated candidly when they obtained this advice. It is simply wrong to say that the candour issue only arises in criminal cases. It is right to say that the Council would already have communicated with their legal advisors when they obtained the particular piece of legal advice requested by Mr West but (a) they may have wished to communicate with the legal advisors further in relation to the matter thereafter and (b) in any event, the public interest in question is general in nature and looks to communication with legal advisors in the future as well as the past.

² See *DBERR v O'Brien* [2009] EWHC 164

Public interest in disclosure

15. The factors which we believe were relevant to the weight of the public interest in disclosure in this case were as follows:

- (1) The underlying dispute between the leaseholders' group and the Council had a bearing on the financial position of a large number of leaseholders and, indirectly, a larger number of rate and council tax payers in Bexley;
- (2) Disclosure of the advice would have promoted transparency and accountability in relation to the Council's decision-making concerning the dispute after it had received the advice;
- (3) Disclosure would have provided some information to the public about the housing stock transfer and the legal position in relation thereto (at least as understood by the advisor in question);
- (4) On the other hand, having seen the advice, we can safely say that its disclosure would not have revealed any wrongdoing of any kind on the part of the Council or anyone else;
- (5) Nor was the information in the advice of any great intrinsic interest to the public;
- (6) We also think it is relevant that the information did not relate to what would normally be understood to be matters of "environmental" concern.

16. Mr West makes various points in relation to the public interest in disclosure at paragraphs 2.2.1 to 2.2.3 of his notice of appeal. Paragraph 2.2.1 really simply highlights the financial interests affected by the dispute between the leaseholders' group and the Council; we recognize those in paragraph 15(1) above. In paragraph 2.2.2 he says that disclosure of the advice would have helped the public understand the legal basis for the contention that the housing association rather than the Council was responsible for the roads and footpaths after transfer; that is true to an extent as we recognize in paragraph 15(3) but, as Mr West appears to recognize in his paragraph 2.2.2, the transfer documentation is of far more significance in this respect. In paragraph 2.2.3 Mr West suggests that the advice was obtained for the

benefit of the people of Bexley and not for the benefit of the London Borough of Bexley as a separate legal personality and that a local authority has a special obligation of transparency which does not apply to any other legal personality; we do not accept that local authorities have any special obligation of transparency and in our view full recognition should be given to their separate legal personality in the same way as it is in the case of any other public authority.

Balance of public interests

17. Weighing up the competing public interests in this case as we have described them in paragraphs 13-16 above and bearing in mind the presumption in favour of disclosure, we nevertheless agree with the Commissioner that the public interest in maintaining the exception outweighed that in disclosure in this case.

Conclusion

18. We are therefore of the unanimous view that the appeal should be dismissed.

19. There is a right of appeal from this decision on any point of law. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of the decision. Such an application must identify the error or errors of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

HH Judge Shanks

Dated 25 October 2010