IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0227
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50384153

Dated: 13 September 2011

Appellant:	Julian Todd
Respondent:	Information Commissioner
Additional Party/ Respondent:	Secretary of State for Communities and Local Government

Decided on the papers

Date of decision: 4th April 2012

Before

DAVID MARKS QC
(Judge)

and

GARETH JONES
ROSALIND TATAM

Subject matter: **Legal professional privilege: Freedom of Information Act 2000, section 42(1)**

Cases: ***Bellamy v Information Commissioner*** **(EA/2005/0023)**
Kirkaldie v IC & Thanet DC **(EA/2006/0001)**
Kitchener v IC **[2006] UKIT (EA/2006/0044)**

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0227
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the Appellant's Appeal and upholds the Decision Notice of the Information Commissioner (the Commissioner) dated 13 September 2011 Reference No. FS50384153

[Signed on original]

David Marks QC
Judge

4th April 2012

REASONS FOR DECISION

Introduction

1. The request in this case concerns legal advice and in particular advice sought by a Government Department, namely the Department for Communities and Local Government (DCLG) as to whether the Energy Performance Certificates (EPC) for private developments contain personal data within the meaning of the Data Protection Act 1998 (DPA). The relevant exemption for present purposes under the Freedom of Information Act 2000 (FOIA) is the qualified exemption in section 42(1). EPCs contain property addresses. The DCLG had explained Energy Performance Buildings Regulations prohibit disclosure of EPCs save as otherwise provided for within those Regulations. Even if an address did not constitute personal data it could only be released to a prescribed list of people and parties. In 2011 the DCLG had instructions as to whether the said Regulations should be amended in order for the data to be more widely available. As at the date of the Decision Notice no final formal amendments had been made.

2. Whereas much information in relation to property such as details about ownership and planning developments are generally publicly available, eg from HM Land Registry and Local Authorities, the databases regarding EPCs in respect of the same properties are not generally available for inspection or access.

3. In his Decision Notice the Commissioner accepted that the value in withholding the requested information diminished over time. The legal advice in the present case dated from 2007 to 2010, and the public interest in releasing the information in order to facilitate the improvement of the fuel efficiency of buildings was therefore increased. It had been contended for by the requester that there was no prospect of there being any legal proceedings based on this legal advice as to a large extent the same legal advice had been included in the terms of DCLG publications and therefore

the public interest in improving the fuel efficiency of buildings was therefore increased.

4. The Commissioner disagreed with these contentions. He pointed amongst other things to the DCLG having indicated that it was at the time of the Notice exploring other avenues for bringing about greater transparency. There was also a strong element of public interest relating to section 42(1) which militated in favour of maintaining the exemption generally. In all the circumstances the Commissioner decided to order that there not be disclosure and therefore upheld a previous decision and formal review of the DCLG to such effect.

Background

5. As indicated above access to the England Wales domestic and non-domestic EPC Registers is currently controlled by statutory instrument, namely Part 6 of the Energy Performance of Buildings (Certificates and Inspection) (England and Wales) Regulations 2007 as amended (the Regulations).

6. There is a publication dated 2 March 2010 issued by the DCLG entitled "Making better use of Energy performance data: Impact Assessment" which has been shown to and read by the Tribunal. In Chapter 2 of another paper which is a Consultation Paper also dated March 2010 it is stated that these disclosure restrictions were put in place to maintain the integrity of data and to ensure that any disclosures were made in the public interest. Access was therefore only available to a limited number of parties as indicated above.

7. The Consultation Paper went on expressly to recognise that there were "growing calls for access". Later the Paper goes on to observe that in determining the test which would be appropriate for responding to a request for greater access, at least two specific considerations needed to be taken into account: first the need to be clear as to what data is to be shared and secondly, the engagement of an individual's "personal data engaging in particular rights under Article 8(1) of the European Convention on Human Rights."

The Decision Notice

8. The Decision Notice is dated 13 September 2011. It recorded the terms of the request dated 26 June 2010 in the quotation of the request.

> "On page 9 of the document "Making better use of energy performance data: Impact Assessment" published 2 March 2010:
>
> We have performed a Privacy Impact Screening in accordance with the guidance from the Information Commissioner's office. Taking into consideration the responses to the consultation, we will undertake a small scale Privacy Impact Assessment to consider and manage the risks of sharing potentially personal data, in advance of implementing the data strategy.
>
> ***
>
> Can I have copies of: ....
>
> (3) [A]ny legal advice or opinions relating to the determination and the extent that the EPCs of houses at the point of sale (or at any other time) are "potentially personal data" within the meaning of the [DPA]".

The public authority refused to allow disclosure and upheld its decision following an internal review.

9. Section 42(1) of FOIA provides that:

> "Information in respect of which a claim to legal professional privilege or, in Scotland, the confidentiality of communications could be maintained in legal proceedings is exempt information."

10. The Decision Notice then goes on to refer to the two recognised manifestations of legal privilege, namely legal advice privilege where no litigation is contemplated or under way and litigation privilege where litigation is in progress or contemplated. In the present case the Commissioner determined that the former type of privilege was in issue.

11. The Notice pointed out that it had been confirmed that the withheld information had been provided "by two solicitors and two barristers" working in DCLG. The Commissioner said that he was satisfied that the legal advice had been provided by "legally qualified persons" and that it had and continued to remain confidential.

12. When turning to the competing public interests for and against maintenance of the exemption and in support of its contention that there will "always be a strong argument" in favour of maintaining this particular exemption, the Commissioner cited the Tribunal's decision in *Bellamy v Information Commissioner* (EA/2005/0023).

13. Paragraphs 14 to 20 inclusive of the Decision Notice dealt with various arguments in favour of disclosing the requested information and arguments in favour of maintaining the exemption. However, in determining that the public interest in favour of maintaining the exemption outweighed the public interest in disclosure in this case, the Commissioner stressed a number of matters. First, in relation to the contention that there was no prospect of the legal advice any longer being relied on, the Commissioner denied that there was no prospect of any legal challenge: he pointed to the fact that the same could arise by virtue of a complaint to the Commissioner himself or to this Tribunal regarding the disclosure of the information sought. Second, legal advice privilege existed to maintain the confidence between a lawyer and client and the public interest in maintaining such confidence remains strong "even if there is a low likelihood of future legal challenges". Third, the Commissioner pointed to the existence of other means by which DCLG's position that the addresses constituted personal data could be challenged eg by "a statutory route available to have those matters considered through [the Commissioner's] office", i.e., again, a reference to an appeal to this Tribunal which is also referred to by the Notice. The Commissioner added that he noted that the DCLG was at the date of the Notice "currently exploring possibilities for bringing about further transparency and will be consulting on the issues...". In all the circumstances the Commissioner took the view that the public interest in disclosure was limited in the present case.

14. The Commissioner said that there was always a public interest in achieving accountability and transparency which in turn helped to increase public understanding, trust and participation in public authority decision making. Against that the Commissioner pointed to the argument that if advice otherwise subject to legal advice privilege were to be disclosed this would have an adverse effect on the course of justice through a weakening of the underlying principles. The Commissioner pointed to the self-evident point that it was important that public authorities and indeed other litigants and potential litigants be able to consult with their lawyers and confidants to obtain legal advice. The Commissioner quoted from his own published guidance on legal professional privilege to that effect. He also noted that it was important that if an authority was faced with a legal challenge as to its position, it could defend its position properly and fairly without the other side being put at some form of advantage by not having to disclose its own legal advice in advance. There was, therefore, he said always a strong argument in favour of maintaining privilege because of its nature and he quoted the well-known case of *Bellamy v The Information Commissioner* in this Tribunal at (EA/2005/0023).

15. In the circumstances, the Commissioner upheld the public authority's decision.

<u>The grounds of appeal and the Reply of the First Respondent and the Additional Party/Second Respondent</u>

16. The Notice of Appeal is dated 24 September 2011. It raises 4 grounds of appeal.

17. The first ground draws attention to the apparent discrepancy between a written statement provided by the DCLG in a letter dated 19 January 2011 which suggested that the legal advice was drafted by an employee who " has now departed on long term leave" on the one hand and on the other the observation already referred to and made in the Decision Notice that the advice had been provided by 2 solicitors and 2 barristers.

18. The second ground makes the assertion also made in the Notice that the probability or prospect of legal proceedings was minimal if not non existent.

19. The third ground relates to waiver. The Appellant claims "that sufficient information about the arguments relied upon have been disclosed in the Privacy Impact Screening and Privacy Impact Assessment to waive LPP in this case."

20. The fourth ground in effect represents a disagreement with the decision taken by the public authority with regard to EPCs generally, ie that the legal advice it obtained "may" be defective. The Appellant also states that there is no "process of critique or review" with regard to such decision.

21. The initial written responses of both the Commissioner and the public authority who together will be called for the sake of brevity the Respondents, can be summarised in the following way.

22. As to the first ground they claim that any contradiction as to the number and identity of the lawyer or lawyers who provided the advice is simply not material. The Commissioner examined the disputed information and determined the advice was provided by professional legal advisers and, on the face of the documents, the Tribunal agrees with this conclusion.

23. As for the second ground it is claimed that legal advice privilege applies to all legal advice whether or not litigation is in progress. In any event it is claimed it is wrong to assert that there is no possibility of legal proceedings as evidenced by the present application.

24. As for the third ground of appeal even though documents referred to quoted at length in the Appellants' own Response dated 12 November 2011, the said documents do not disclose the substantive content of the legal advice which has in fact been given, cf *Kirkaldie v IC & Thanet DC* (EA/2006/001) 4 July 2006 especially at paragraphs 40 to 43.

25. As to the final ground of appeal the remedy lies in judicial review. In addition and in the words of the public authority's written response, in the

absence of evidence of unlawful activity, evidence that the public authority has misrepresented its legal advice or significantly lacked transparency where it would have been appropriate is simply not available nor indeed is the same alleged and therefore there is no basis for ordering disclosure on the grounds of disagreement with the decision in relation to disclosure of EPCs generally. Pausing here and by way of a passing observation the Tribunal with respect would not concur with any suggestion that judicial review proceedings and an application for a request under FOIA are in some material way mutually exclusive.

26. Subsequently, the formal responses provided by the Respondents, the Appellant provided a further written Reply. The same is dated 20 December 2011. He appears to make three additional observations.

27. The first concerns his first ground of appeal. The Appellant states that he has made separate requests under FOIA for inter alia the name and the identity of any lawyer or solicitor hired to deliver his or her or their professional opinion in issue in the present appeal. He confirms that that request has been refused.

28. The Tribunal pauses here to say that it fails to see the relevance of that observation. The Tribunal is only concerned with the proper or improper application of the exemption claimed in the present case and nothing else.

29. Second, the Appellant seeks to amplify the second ground of appeal. He claims that with regard to the information sought to be disclosed though "it has a shape and texture of legal advice, it is not to be confused with the legal advice which the [public authority] may be receiving from its solicitors pursuant to this tribunal case". He alleges that the latter legal advice would be exempt under section 42 owing to the existence of the present appeal but "it has nothing to do with the object of the case".

30. In addition he points to a document not previously referred to in the evidence, namely a document entitled "Making energy performance certificate and related data publicly available - January 2011 - [DCLG]" which he says has a "detailed point by point reference to [DPA]" and a

"radically differing conclusion, to entirely supersede the legal advice I have requested to see."

31. Again pausing here the Tribunal fails to understand these two propositions. As to the first namely whether or not the "legal advice" received from the public authority's solicitors differs in its nature and/or extent from the information which is sought to be disclosed, as indicated above, the Commissioner and the Tribunal are concerned solely with the issue whether the exemption invoked in the present case was properly relied upon by the public authority. There is no relevant connection whatsoever between the two sets of circumstances referred to by the Appellant.

32. As to the emergence of a new document, in the Tribunal's view the answer provided by the Respondents in relation to the third ground of appeal remains equally pertinent, if not more so, namely that the fact still remains that such document does nothing in terms of disclosing the content of the legal advice which was previously provided and now is sought to be disclosed.

Evidence

33. The Tribunal has received a written statement from Jonathan Bramhall, on behalf of the DCLG both in open, ie redacted and closed, ie unredacted, form. Mr Bramhall is senior policy advisor in the Climate Change and Sustainable Buildings team at the DCLG.

34. He confirms that legal advice had been sought on the scope for making EPCs publicly available on three occasions, namely in 2007, 2009 and 2010. He referred also to the Consultation Paper issued in March 2010 already referred to above in which it proposed that the Secretary of State should be able to grant access to specified organisations including local authorities for certain specified purposes. He observed that it was not stated in the Consultation Paper whether the DCLG's decision to treat address level data as personal data was taken in the light of legal advice or what such advice stated. He added that following responses to the consultation in mid to late 2010 a "very large majority of respondents

supported the proposal to make EPC data available in the way described in the consultation document."

35. A document summarising responses to the consultation was published on 30 November 2010. That document noted at Chapter 2, page 6 that the Government had decided to go further than the proposals detailed in the Consultation Paper and intended to "make all energy performance certificate data publicly available, including the address of the property, its energy performance certificate rating and the energy performance certificate recommendations".

36. Mr Bramhall then refers to section 74 of the Energy Act 2011 enacted on 19 October 2011 which has given the Secretary of State power to make regulations which authorise the keeper of the register to disclose the documents or data held on the registers. In his words:

"The intention is to make, subject to Parliamentary approval, regulations in April 2012 under this section which will make Energy Performance Certificates publicly and freely available".

The "minimum" contents of the date made available will include the address of the building, the recommended measures to improve the energy performance of the building, details of the energy assessor and in due course were there any so called Green Deal finance had been borrowed or improved to improve the property.

The Tribunal's findings

37. As for the first ground of appeal the Tribunal has no hesitation in accepting the contentions advanced by the Respondents. It does so not only for the reasons advanced by those parties but also because it has seen and considered the requested information which has been provided to it as is the invariable practice in the Tribunal in a closed bundle. It wholly endorses the view and decision taken by the Commissioner in that respect.

38. As for the second ground of appeal the Tribunal again rejects the Appellant's principal contention and accepts those of the Respondents. In addition to the contentions set out above, the Tribunal accepts the additional argument contained in Mr Bramhall's evidence to the effect that there is at least a prospect of challenging decisions not to disclose or to disclose EPCs coupled with the possibility of challenge to the proposed regulations in the wake of the recent consultation process on the ground that they could not be seen as being compatible with the DPA. See by analogy *Kitchener v IC* [2006] UKIT (EA/2006/0044).

39. As for the third ground of appeal and the allegation that there has been a waiver of privilege in addition to the arguments advanced by the Respondents referred to above, the same parties address the specific contention made by the Appellant that the effect of both the Privacy Impact Screening and the Privacy Impact Assessment is to effect a waiver of any and all privilege. As the public authority points out the former document stated that address level data would need to be treated as personal information: it did not state whether the decision to do so was taken in the light of legal advice let alone what the advice was. The latter document stated that the issue as to whether or not address level data was "not clear cut" a choice had been made to treat it as such and against that decision no reference was made to legal advice in any other way such as to suggest that there had been disclosure of the terms and effect of any legal advice. The Tribunal again accepts those contentions and rejects this ground of appeal.

40. As for the fourth and final ground of appeal and the claim that the supposed or actual effect of the legal advice would be to prevent certain policies from being implemented which in turn could lead to price differentials between houses that are poorly insulated and those which are fuel efficient, the Tribunal again accepts the contentions advanced by the Respondents that should the merits or demerits of a decision not to disclose the EPCs not be acceptable to any party, such a party at all times can make a challenge by means of judicial proceedings including but not limited to an application for judicial review. Moreover, to repeat a point

referred to above, the Appellant has not alleged in any way that the public authority here has acted in any way unlawfully or has in any way improperly misrepresented the legal advice. The Tribunal in this case again agrees with the public authority that in such circumstances there can be no justification for impugning what was otherwise a straightforward decision by the DCLG not to disclose the information requested.

Conclusion

41. For all the above reasons the Tribunal dismisses the Appellant's appeal and upholds the decision of the Commissioner.

Signed:

[Signed on original]

David Marks QC
Judge

4th April 2012