

IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2012/0101

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50419718

Dated 27th March 2012

BETWEEN

MR COURTNEY INCHBALD

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

and

LONDON BOROUGH OF WANDSWORTH

Second Respondent

Determined on the papers on 21st September 2012 at Field House

Date of Decision 22nd day of November 2012

BEFORE

Fiona Henderson (Judge)

Suzanne Cosgrave

And

Rosalind Tatam

Subject matter: FOIA – S42 Legal professional privilege

- S12 Costs limit

Cases: Three Rivers DC & Others V Governor and Company of the Bank of England No5 [2003 QB 1556]

Three Rivers District Council and others v The Governor and Company of the Bank of England No 6[2004] UKHL 48

AM&S Europe Limited v Commission of the European Communities Case 155/79
Investors Compensation Scheme v West Bromwich Building Society 1997 UKHL 28

Alfred Crompton Amusement Machines v Customs & Excise Commissioners No.2 1972 2 QB 102 @129

IN THE FIRST-TIER TRIBUNAL

Case No.EA/2012/0101

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below and in the closed schedule, the Tribunal refuses the appeal and upholds decision notice FS50419718 dated 27th March 2012.

Dated this 22nd day of November 2012

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50419718 dated 27th March 2012 which concluded that the London Borough of Wandsworth (the Council) has correctly applied the exemption of legal professional privilege and the exemption that the cost of compliance exceeds the appropriate limit.
2. The Appellant sought to agree the terms of a lease for a "ransom strip" of land adjoining his property which he had been using under licence to enable him to park his car beside his house. Although the Council and the Appellant were able to agree the rental figure and an increase formula after negotiation, the contract was not signed because the Appellant felt that the clause stating:
"VAT will be added where there is any obligation to pay money" should not appear in the lease. Following prolonged correspondence the Council withdrew the offer of the lease and reincorporated the land into the leisure centre next door.
3. On 30th August 2011 the Appellant wrote to the Council requesting:
"... please now provide copies of all documents and correspondence both internal and external relating to the validity of the VAT clause. You need not provide copies of correspondence with me".

4. Following the involvement of the Commissioner, the Council refused the request relying upon s42 FOIA (legal professional privilege). This was upheld on review in relation to the majority of the information although some disclosure was made in relation to complaints to the Local Government Ombudsman (LGO). The Council further relied upon s12 FOIA (namely that the cost of compliance exceeds the appropriate limit).

Legal professional privilege

5. The Appellant makes the following submissions in relation to the ability of the Council to rely upon legal professional privilege. These are dealt with in turn.
6. The Appellant disputes that s42 FOIA is engaged. He argues that the Council were obliged to define "the client" in advance and restrict the information to those individuals and that they did not do this. He further argues that privilege was waived as the information was not restricted to the original senders and recipients in the Council.
7. The Tribunal agrees with the Council and Commissioner that there is no need to define the client in advance. In *Three Rivers DC & Others V Governor and Company of the Bank of England No5 [2003 QB 1556]* the client team was defined by the Court after the event. The facts of that case were that a unit had been set up within the Bank for a defined, narrow and very specific function.¹ No such internal "unit" exists on the facts of this case. The Council is a corporation aggregate, we are satisfied that the client is either the Council as a whole or those:

- a) providing information to the legal team for the purposes of seeking legal advice and
- b) those receiving legal advice from the in-house team.

Providing information to a FOIA officer to enable him to fulfil his function cannot waive privilege. There is no evidence before us that the withheld information is disseminated beyond the relevant Council employees.

8. The Appellant argues that to attract legal professional privilege, lawyers must be independent of their client. He relies upon 2 cases² in support of this contention.

¹ In a later judgment on a different question in *Three Rivers District Council and others v The Governor and Company of the Bank of England [2004] UKHL 48* where this point did not arise however, Lord Carswell noted that he was "not to be taken to have approved of the decision" on the scope of the privilege point and he "reserved [his] position on its correctness" (§ 118).

² *AM&S Europe Limited v Commission of the European Communities Case 155/79*
Investors Compensation Scheme v West Bromwich Building Society 1997 UKHL 28

9. The cases relied upon by the Appellant relate to the specific circumstances pertaining to investigations by the European Commission and are not applicable here. We are satisfied that in-house lawyers attract the same privilege as external lawyers Alfred Crompton Amusement Machines v Customs & Excise Commissioners No.2 1972 2 QB 102.
10. The Appellant argues that the Council breached its own procedures for seeking legal advice pursuant to the Borough Solicitor's delegations as set out in the Council's constitution.
11. Again, the argument he makes does not apply to this case. The Council's scheme of delegation authorises the Borough Solicitor to perform certain of the Council's functions e.g. issuing legal proceedings for the Council if he has instructions from the appropriate Director or Head of Service. However, the scheme of delegation is silent as to who is entitled to seek legal advice from the Council's in house team who are employed in part to provide such advice.
12. The Tribunal has reviewed the withheld information and is satisfied that in relation to the documents, identified within the closed schedule as being within scope, legal professional privilege is engaged. It is also satisfied there is no basis for the Appellant's claim that the Council's legal department is conflicted "*...in having made the mistakes leading to the dispute.*"

Public Interest

13. The Tribunal reminds itself that legal professional privilege is not an absolute exemption and that a judgement has to be made as to where the public interest lies before a decision can be made to withhold the information. This cannot be done without having regard to the specific pieces of information, firstly to see whether legal professional privilege is engaged and then to judge the balance of public interest. The Appellant argues that the public interest test favours disclosure. The Tribunal adopts the Commissioner's analysis of the relevant Tribunal Decisions and applicable law, the public interest arguments and

his assessment of where the public interest lies³ as set out in his Decision Notice; but makes the following additional observations in light of the Appellant's submissions.

14. The Appellant argues that the withheld information contains "*evidence of wrongdoing or poor administration, even if only widespread ignorance of the issues*".⁴ Whilst the Appellant acknowledges that the validity or otherwise of the VAT clause is not within this Tribunal's jurisdiction, he seeks to introduce it to the public interest test by asserting that the clause was misleading and that the Council were aware of that. He argues that the Commissioner was wrong to conclude that there was no evidence of wrongdoing when he hasn't considered the defectiveness of the VAT clause.
15. The Tribunal and FOIA is not the correct venue for a challenge to the correctness of legal advice. The role of the Commissioner and Tribunal is not to assess whether it agrees with the legal advice but to assess on a balance of probabilities whether it is evidence of improper conduct. The Tribunal accepts that there would be a public interest in disclosure where to do so would help determine whether public authorities had acted improperly. The Tribunal has seen all the disputed information and is satisfied that there is no evidence to support that contention.
16. The Appellant argues that the legal advice is no longer live as any criminal offences have "timed out". The Tribunal notes that it is required to have regard to the position which existed at the time of the request/internal review, and also that litigation is not limited to criminal offences and on his own admission in his reply he indicated that he was "*certainly minded to take other legal action*"⁵.
17. The Tribunal has reviewed the withheld information and is satisfied that that the public interest favours withholding the information.

Section 12 FOIA

18. The Appellant does not dispute that the appropriate costs limit has been reached within the terms set out in the *The Freedom of Information and Data Protection (Appropriate*

³ Decision Notice paragraphs 19-34.

⁴ Para 14.2 Appellant's submissions

⁵ Para 20.1 Appellant's Reply 19.6.12

Limit and Fees) Regulations 2004. He does, however, argue that searching for documentation in the emails of the Borough Solicitor when it was likely that these would be legally privilege was a waste of resources. The implication he draws is that the Council has deliberately thwarted his attempts to obtain information by looking for information that is unlikely to be disclosable under FOIA and that as such they should not be allowed to rely upon s12 FOIA.

19. The Council's position is that in light of the terms of the request the most likely places information would be found was within the emails of the Borough Solicitor and the Borough Valuer and that consequently a search in these areas was prioritized. They also identified a further 44 officers whose records would need to be searched to ensure that all information within scope was identified.
20. The Tribunal considers that it is appropriate to look first in the places where information is most likely to be found and that in light of the terms of the request the legal department was an appropriate place to search. Failing to search there could have been said to involve an inappropriate prejudice of the public interest test.
21. The Appellant lists places where he believes more information is held. The Tribunal makes no determination as to whether additional information is held in light of its findings that the costs limit has been reached. This point therefore fails.
22. The Appellant further argues that the withheld information is incomplete, arguing that the withheld emails are isolated and that the originating or response emails to these communications must also be disclosable.
23. The Council have provided a schedule of correspondence with the Appellant (p171 OB). This can be correlated with the documents in the closed bundle by reference to the final date in each email thread. It is notable that the dates given in the schedule are of the final email in each thread. The schedule is incomplete in the sense that it does not record the dates of the emails within the thread, although where it is sought to withhold an email, the entire thread has been included in the closed bundle.

24. The Tribunal agrees that the presentation of the withheld material has not been helpful. The Tribunal had regard to rule 2 of the *Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009* and was satisfied that it was not in the interests of justice to adjourn the matter for the public authority to review and resubmit the material. An adjournment would have led to delay and additional expense and would have been disproportionate, as it was possible (albeit onerous) to follow the evidence.
25. The Tribunal accepts that the withheld emails are not in each case an isolated email but a chain of emails. Whilst some of the originating and subsequent emails have been disclosed, where they pertain to the legal advice they have been withheld. The Tribunal has considered the closed material and (as set out in the closed schedule) is satisfied that those documents that fall within the scope of the request have been properly withheld pursuant to s42 FOIA.

Bias

26. The Appellant argues that the Decision Notice is flawed because the Commissioner showed apparent prejudice against him in that he relied on the professional judgement of the Borough Solicitor rather than accepting the Appellant's submissions. The Commissioner strenuously denies this suggestion.
27. Appeal to the Tribunal acts as a complete re-hearing; thus, the Tribunal has re-examined all the points raised by the Appellant and upholds the Commissioner's decision for the reasons set out above. As such this ground also fails.

The Closed schedule

28. We make the observation that the closed bundle was very difficult to follow and the evidence not prepared with care. The timings of the emails in the p171 Open Bundle (OB) schedule were not always accurate. The schedule at p175 OB numbered the emails but the witness evidence referred to Closed Bundle (CB) page numbers and did not number the emails. One of the emails did not have a number making it harder to follow which document was which. Despite the schedules at p171 and p175 OB clearly stating that certain documents had been disclosed and their appearance in the open bundle, they appeared in the closed bundle with supporting witness evidence as to why

they should remain withheld. There was no marking on the closed bundle to show what material was redacted and what had been disclosed requiring a side by side reading of the open and closed bundles.

29. The Tribunal has prepared a closed schedule setting out its specific findings when applied to the evidence. In so doing it applies the reasoning in the open decision to each document. This has been done in tabular form to reconcile the different sources of evidence and for ease of reading.

Dated this 22nd day of November 2012

Fiona Henderson
Tribunal Judge