IN THE FIRST-TIER TRIBUNAL **Case No: EA/2012/0102**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: **FS50428373**

Dated: **27 MARCH 2012**

Appellant: **THE BLACKHEATH SOCIETY**

First Respondent: **INFORMATION COMMISIONER**

Second Respondent: **LONDON BOROUGH OF LEWISHAM**

Heard at: **FIELD HOUSE, LONDON**

Dates of hearing: **8 NOVEMBER AND 17 DECEMBER 2012**

Date of decision: **15 JANUARY 2013**

Before

ROBIN CALLENDER SMITH
Judge

and

STEVE SHAW and ROSALIND TATAM
Tribunal Members

Attendances:

For the Appellant: Joseph Barrett, Counsel
For the First Respondent: not represented at the oral appeal but submissions were made in writing
For the Second Respondent: Jason Coppel, Counsel

Subject matter:

FOIA

Whether information held s.1

Qualified exemptions

- Legal professional privilege s.42

Cases:

West London Pipeline & Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm), *DBERR v O'Brien & IC* [2009] EWHC 164 (QB), *Brennan v Sunderland City Council* UKEAR/349/08, *Mersey Tunnel Users Association & IC v Merseytravel* (EA/2007/0052) and *Linda Bromley v Environment Agency* (EA/2006/0072).

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DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 27 March 2012 – with differences as to content explained within the decision - and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The London Borough of Lewisham (the Council) has statutory responsibility for part of Blackheath Common. During 2010 it granted a licence under the Licensing Act 2003 to Nimby Events Ltd (Nimby) which would allow Nimby to fence off part of the Common in order to hold a music festival and to sell alcohol.

2. The Council sought legal advice on the issue of whether Ministerial Consent would be required before the festival (and Olympic and other events requiring temporary structures to be erected and / or restricting access to part of Blackheath) could go ahead or whether this decision could be made by a relevant senior Council employee.

3. The Blackheath Society, a registered charity, that includes in its Objects "To …protect from encroachment its open spaces…" (the Society), became aware that a second legal opinion had been sought on the same issue and, on 29 September 2011, the Society requested the following information from the Council:

> We ask that we should be provided with copies of the instructions and opinions of both counsel, together with all internal memoranda, notes of meetings etc relating to the circumstances in which the decision to obtain a second opinion was taken on such terms as you may reasonably consider to be appropriate. ….

4. On 19 October 2011, the Council issued its refusal notice. It said that it did not hold any internal memoranda or notes of meetings in which the decision to seek a second legal opinion was taken. In relation to the actual instructions and legal advices, it claimed section 42 applied and argued that the public interest test favoured maintaining that exemption.

5. On 10 November 2011, the Society sought an internal review of the Council's refusal to disclose the requested information and its claim that no internal documentation was held.

6. On 28 November 2011, the Council confirmed that no internal documentation on the decision to seek a second legal opinion was held because the matter had only been discussed verbally.

7. The Council did not review its decision to claim section 42 in relation to the withheld information and instead provided the Society with a copy of its consideration of the public interest test which it had summarised in its refusal notice.

8. On 15 December 2011 the Society referred the refusal of its request to the Information Commissioner (IC).

The complaint to the Information Commissioner

9. The IC noted at Paragraph 13 of his decision notice that the Council had found an email which fell within the scope of the request, contrary to its earlier position that it did not hold any internal information on the decision to seek a second legal opinion.

10. This email of 16 August 2011 had been disclosed to the Society. Notwithstanding this discovery, the IC found, on the balance of probabilities that the Council did not hold any further information which fell within the scope of the Society's request based on the Council's explanations regarding its records management and its search strategy.

11. In relation to the instructions to Counsel and legal advices, the IC accepted that section 42 was engaged in respect of the withheld information. The IC went onto consider the public interest test.

12. He acknowledged the strong element of public interest inbuilt in maintaining the principle of withholding information subject to legal

professional privilege and the fact that the material legal advice was 'live' at the time of the request.

13. The IC, however, also acknowledged the public interest in disclosing information which would promote openness and transparency in relation to the Council's decision-making process, particularly in relation to an issue which is of some considerable local concern and where the Council had somewhat unusually sought two legal opinions.

14. On balance, the Commissioner found that the public interest factors in favour of maintaining the exemption outweighed those factors in favour of disclosure.

The appeal to the Tribunal

15. In its appeal to the Tribunal dated 24 April 2012, the Society set out the following points in summary :

(1) The IC was wrong to find that the Council did not hold any additional information which fell within the scope of the request in the light of the delayed discovery of the email of 16 August 2011 during the course of the ICs investigation. That email should have been found earlier because:

(i) it contained two of the search terms used by the Council in its search of its electronic records, namely 'Nimby' and 'Blackheath';

(ii) the email had been generated by the Executive Director and copied to other departments which the Council said it had searched;

(iii) the email was only sent six weeks before the Appellant's request; and

(iv) the email was addressed to the employee who subsequently denied that the Council held any information in relation to this aspect of the request.

The IC should have conducted an investigation into how that email had been missed during the original search.

(2) The IC should have investigated whether a former member of staff might have had emails relating to the matter.

(3) A properly managed local authority should not commit to incurring the significant costs of obtaining a second legal opinion without making any record of its decision to do so.

(4) That the information sought was unlikely to have been of such an ephemeral nature that it would have been routinely deleted from the records of all officers involved with the issue at the time within six weeks.

(5) That weight should be given to the possibility that the Council might consciously have decided that it did not wish unnecessarily to disclose material relevant to what was a highly contentious local decision and that it would only do so if – for example – a request was made with pinpoint accuracy.

(6) In relation to the Council's application of section 42, the legal advice had lost its quality of confidence - rendering the exemption unengaged – because:

> Although there is, according to the Council, no note or minute of the meeting with NIMBY organisers….it seems that Mr Smith must have shared the substance of the first [legal] opinion with them, since he records in the email that 'unsurprisingly NIMBY have a contrary opinion' to that of counsel. Although there is no record….to show that the NIMBY organisers were subsequently informed of the [second legal opinion] it is reasonable to assume that Council officers…. would have shared [the second legal opinion] with the organisers….

(7) It was in the public interest to disclose the withheld information

> ….to ensure that, in the future, before agreeing to an event that required fencing, the law was correctly understood by all interested parties…. [This] is of particular importance not just in relation to the NIMBY, but in case it is treated as a precedent in other cases where fencing of part of the Heath is required by an event organiser…. The opinions relate principally, if not solely to the proper construction of Victorian legislation…. In relation to what must be an uncontroversial set of facts.

(8) There was a public interest in the disclosure of legal advices which were funded by the public purse and that local residents and taxpayers had a "very great interest" in knowing the contents of the legal advice from acknowledged experts in the relevant field.

(9) If the legal opinions and surrounding materials were made available then it would allow the Society to decide whether it would be appropriate to take external advice.

(10) Although the possibility of litigation was only theoretical in this case there was a strong public interest in avoiding unnecessary litigation and, in this case, there were differences of opinion. If the advice in support of the Council's revised attitude towards ministerial consent was sound then that would be the end of the matter because no one would wish to embark on fruitless litigation.

(11) The difference in attitudes between successive Executive Directors of the Council suggested that a predetermined result was required from Counsel and that good governance should have required that a properly documented record should have been retained.

The questions for the Tribunal

16. Was there (further) additional information that was "held" by the Council which should have been disclosed to the Society as a result of its request?

17. Did the s.42 exemption in relation to legal privilege apply to prevent disclosure of the detailed information in the two legal opinions?

Evidence

18. The Tribunal began the appeal hearing on 8 November 2012. The matter was adjourned because two things became apparent which needed to be addressed and clarified. Was further information within scope held, and did the IC's Decision Notice incorporate evidence relating to a different request? Those are addressed here. If these two matters had been raised by any party in advance the adjournment would not have been necessary.

19. There was a lack of clarity about which information request the IC had responded to in the Decision Notice. The issues in relation to that were clarified by Mark Pybus, the Principal IM&T Manager on the Council's

Corporate Information Team. He was responsible for Freedom of Information on Data Protection within the Resources and Regeneration Directorate of the Council. In a witness statement dated 7 December 2012 – adopted by him at the adjourned hearing on 17 December 2012 and on which he was cross-examined - he stated:

> On occasion, requests are made directly to individual Council departments and can be dealt with in the first instance by those departments without reference to the centre. That is what occurred, initially, in relation to the request which is the subject of these proceedings (Council reference number 161616). My team became involved with that request when the Appellant requested an internal review which was conducted by my colleague…. I handled the response to the ICO's investigation of the response to request 161616. My team has also dealt with various other requests made by the Appellant in recent times, including request 166433, which was made in response to [the] internal review of the response to request 161616. When I read the ICO's email of 24 January 2012 I was confused as to which requests exactly…. the ICO was referring to. It was clear that he was concerned with request 161616 regarding the seeking of a second Opinion from Counsel. However, he also asked questions concerning electronic searches which I felt could also have referred to request 166433, which had prompted some electronic searches. I was concerned to ensure that we provided all the information which the ICO required and I believed that the appropriate course was to ask [the ICO] which requests were in issue. Therefore, I telephoned [the ICO] on 26 January 2012 and told him that the Council had dealt with a number of different requests from the Appellant, and asked him which request or requests he was concerned with. He looked through some papers while we were on the phone and told me that he was concerned with request 166433. I asked for this to be confirmed in writing, which he did approximately 30 minutes later, in an email [which is exhibited to the witness statement]…. I concluded that the ICO could not only be concerned with request 166433, as the email of 24 January plainly referred to the request regarding Counsel's Opinion, which was request 161616. I considered that the safest course was to respond to the ICO in relation to request 166433 but also to respond to the questions regarding legal professional privilege which could only have referred to request 161616. That is what I proceeded to do. My email to [the ICO] on 20 March 2012 confirms my understanding that the ICO would be proceeding to issue a decision notice which concerned both requests.

20. Following the 8 November 2012 Tribunal hearing that had to be adjourned, and in response the directions regarding electronic searches issued at the adjournment by the Tribunal, he explained that he then wrote to several senior colleagues within the Council (listed at Paragraph 8 of

his witness statement) on 15 November 2012 asking them to search for information that might be relevant to request 161616 Those individuals had responded to him and the only potentially relevant information that had come up was an *Outlook* diary meeting invitation in respect of a meeting on 23 August 2012 which did not – in the event – take place and an emailed response to that invitation (with a further reply) dated 7 September 2011.

21. A key witness for the Second Respondent, a principal lawyer with responsibility for Property and Planning within the legal services department of the Council (Ms Katherine Kazantzis), had not conducted or commissioned any searches of electronic mailboxes or any other electronic searches in relation to email communications between Council officers and the information request. Also, she had not checked for any manually-kept information.

22. In her written witness statement dated 7 December 2012 – adopted at the adjourned hearing and on which she was cross-examined - she covered the detail of how she sought to rectify the omissions following the adjourned hearing on 7 November 2012 as follows:

> During the preparation for this hearing [the 7 November 2012 appeal hearing], and in consultation with Counsel, it has come to light that when compiling the Decision Notice, the ICO adopted comments made by Mr Pybus specifically in relation to request 166433 and applied them to the request which is the subject of the Decision Notice 161616. Contrary to the reasoning in the ICO's decision notice, the Council has not conducted electronic searches in response to the 29 September 2011 request. I have described [earlier in the witness statement] the checks which I have made in an effort to discover documents within the scope of the request. With the benefit of hindsight, I would accept that my initial search ought, for the avoidance of doubt, have extended to email communications regarding the Council's decision to seek a second opinion from Mr Goudie QC. However I am confident that no such communications, save from that of Mr Smith dated 16 August 2011, were sent at the material time and that there were and are no further electronic communications which fall within the scope of the request. Since the Tribunal hearing on 8 November 2012 I have taken steps to confirm what I had said [above] is to the effect that there were no notes of the meeting 8 September 2011. As I have said, I knew that I had not taken a note of the meeting. If I had done, and if I had

considered the notes to be worthy of retention, I would have placed them in a manual file which I keep on the general subject of Blackheath. There are no such notes in that file. I have also checked the legal pads which I have retained which might cover events during that period but, again, these contain no notes of the meeting. As I have stated….this is not particularly surprising. There was no disagreement at the meeting, and the Instructions to Counsel which I prepared subsequently stand as the outcome of the meeting. I have also checked again with the other attendees of the meeting and confirmed that they did not take a note either. Nor are there any manual diary entries which might shed light on the events at the meeting. Council employees generally keep electronic work diaries only and that is the case with the persons concerned in this instance.

23. The Tribunal also had sight of the disputed information. It has, therefore, been able to be as informed as is possible about the issues within this appeal and has applied a rigorous and critical approach to the consideration of whether the disputed material should be made public either in its totality or in a partially redacted form.

24. The Tribunal is particularly conscious of testing the public interest and proportionality arguments in such situations – where the Appellant does not get to see the disputed information during the course of the appeal itself – because the Tribunal is seeking to create and ensure the greatest possible transparency in the process.

25. In the event it has been possible to conclude the decision in this appeal without reference to a confidential annex that might refer in a more detailed fashion to the substance of the documentation in the closed bundle.

Legal submissions and analysis

26. Mr Barrett, Counsel for the Appellant, submitted that there were three principal issues in the appeal: (1) on the balance of probabilities did the Council hold further information concerning the decision to go “Opinion Shopping”; (2) had the Council lost legal advice privilege in respect of the first Opinion and/or the second Opinion by disclosing the substance of the advice to NIMBY and/or the Appellant; and (3) in the particular circumstances of the case did the public interest in disclosure outweigh the public interest in maintaining the Council’s legal advice privilege under

section 42 (1) FOIA so that the Council should disclose its instructions to counsel and the content of the two Opinions to the Appellant?

27. His final submissions concentrated on whether the requested information was "held" or not and the public interest balancing test. He submitted that, in relation to the first point, the Council had failed to show that the quality of its initial analysis of the request, the scope of the searches that it decided to make on the basis of that analysis and the rigour and efficiency with which the searches was then conducted (see Paragraph 13 *Bromley*) met the required standard for the Tribunal to be satisfied that further information was not held by the Council.

28. In relation to the second point he pointed to the public interest in the transparency of an exercise that had involved spending public money to obtain the Opinions of two leading Counsel, the public interest in being able to see the second opinion being relied on to hold events of this nature, the disclosure of the instructions to Counsel which would show whether it was being sought as a result of inappropriate lobbying by Nimby and / or the Council's commercial pressures (if, as a result of the first Opinion, it became harder to host events on the Heath).

Conclusion and remedy

29. The IC and the Council should arguably have demonstrated in their respective submissions in advance of 8th November that the Decision Notice was wrong on the matter of 'held' because it described searches made for another request. As a result of the necessity of an adjournment in this appeal case – because it was also clear that a full and thorough search could not be said to have been conducted in the first instance - the Tribunal was in the position of being able to see directly whether more relevant information was uncovered by the additional exercise the Council was required to undertake during the period between the adjournment and the resumed appeal hearing.

30. The Tribunal has noted that manual note-taking in respect of meetings involving topics of some substance, within this section of the Council's Legal Services Directorate, appears to be the exception rather than the norm. Manual note-taking does not seem to have entered anyone's mind in respect of the process of moving from the consideration of one QC's opinion of a relatively important area of activity in Lewisham to the obtaining of another QC's opinion.

31. Be that as it may, the Tribunal accepts the evidence regarding the information held provided by the oral witnesses for the Council. The Tribunal had the opportunity of seeing them deliver their evidence in chief, face cross-examination, and answer questions from the tribunal itself.

32. While what was disclosed did not reveal a neat and tidy account of how the request for information was handled, it is to the credit of the Council - and the witnesses themselves - that they identified and accepted shortcomings in what had happened initially and had then gone through processes addressed towards remedying those shortcomings.

33. In the event the witnesses gave their evidence credibly and – on the issue of whether any further information relevant to the request was held by the Council (or, as far as the Appellant was concerned, not discovered to be held perhaps because of a particular mind-set of the Council) – cogently and comprehensively.

34. On the basis of the additional effort that was required to comply with the Tribunal's further directions following the adjournment on 7 November 2012 the Tribunal is satisfied that there is no further information held by the Council relating to the Appellant's request dated 29 September 2011.

35. In terms of the section 42 issues in this appeal there is an initial point about the scope of the case. The Commissioner initially expressed the scope of the case, among other things, as involving whether the Council "correctly confirmed that it does not hold information relating to the

decision to seek a second opinion". Actually the scope of this portion of the appeal related to the "circumstances in which the decision was taken".

36. In terms of the substance of the operation of section 42 the Tribunal in this appeal finds that it is fully engaged because the disputed information relates to communications made by or to qualified solicitors for the dominant purpose of obtaining or giving legal advice.

37. The Appellant clearly believed that the first QC's Opinion had been disclosed to NIMBY by the Council in March 2011. The Tribunal received written evidence – which was not challenged - from two witnesses on this point, Thomas James Wates (a Director of Nimby) and Peter Gadsdon (Head of Strategy and Performance, Customer Services Directorate at the Council). It is thus clear that NIMBY had merely been informed of the fact that the Council had obtained Counsel's Opinion, not the opinion itself. That information is still confidential from the world at large. It has not been shared with anyone outside the Council and there has been no waiving of Legal Professional Privilege (LPP) either inadvertently or accidentally. Any disclosure of the advice and the related summary was restricted and did not cross into territory that put the effect of LPP at risk.

38. The Tribunal has considered the effect of both the *Mersey Tunnel* and *O' Brien* decisions on the factual matrix and the context of this appeal. It is significant that there is a clear and obvious further litigation risk disclosed by the Appellant in the request itself. By way of comment, litigation itself was never in prospect in the *Mersey Tunnel* case.

39. Although seeking a second Opinion may seem to be an unusual step it is quite a reasonable course of action for the Council to consider. The Tribunal can find no improper purpose or irrationality that led to seeking that second Opinion.

40. It would require very strong public interest reasons to depart from the protection given to LPP and, in this case, having balanced the factors

argued by the parties, the Tribunal is not satisfied that the high threshold required for this to happen has been reached.

41. The Tribunal has been conscious that the less-than-thorough searching for “held” information presents a less-than-efficient picture of a portion of the Council’s work but that is not to say that it generates anything close to an additional or definitive factor that can be weighed into the section 42 equation.

42. The Council – as a public authority – is entitled to seek the protection of LPP so that it can engage in free and frank exchanges with its legal advisers and receive robust and complete advice.

43. For all of these reasons the appeal is dismissed.

44. The decision is unanimous.

45. The adjournment on 7 November 2012 should not have been necessary given the detailed directions issued in this appeal by Judge Taylor from 8 June 2012 through to 21 September 2012.

46. The issues in relation to any wasted costs that parties wish to explore will be considered by the Tribunal separately.

47. Initially this will be by way of written submissions and – given that it is likely that it will be the Appellant applying for consideration of an application for wasted costs – quantification and justification of any claim will need to be served on any relevant party from whom they are sought in writing (with appropriate supporting evidence).

48. The Tribunal’s suggestion is that that takes place when it is clear whether the parties accept the decision of the Tribunal or whether the decision will be subject to a request for permission to appeal to the Upper Tribunal.

Appropriate time will be given to any other party to respond in writing and there may need to be an oral hearing on the issue of wasted costs, subject to the consideration by the Tribunal of any relevant representations.

[Signed on original]

Robin Callender Smith

Judge

15 January 2013