IN THE FIRST-TIER TRIBUNAL Appeal No: EA/2012/0198
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
F50442764

Dated: **16th. August, 2012**

Appellant: **Sarah Hartles**

Respondent: **The Information Commissioner**

Determined: **27th. February, 2013**

Before

David Farrer Q.C.

Judge

and

Ann Chafer

and

Michael Hake

Tribunal Members

Date of Decision: 18th. March, 2013

Representation:

The Appellant acted in person, her submissions being made by Mr. A Hartles .

For the Respondent: Laura John

Subject matter:

FOIA s. 42 Legal professional privilege

Environmental Information Regulations,

Reg. 12(5)(b) – Disclosure of environmental information adversely affecting the course of justice

Cases : *Three Rivers v Governor of the Bank of England [2004] UKHL [2005] 1 AC 610*

Department of Communities and Local Government ("DCLG") v Information Commissioner ("ICO") [2012] UKUT 103

Archer v IC & Salisbury District Council [2011] 1 Info LR 1405

Department of Business Enterprise and Regulatory Reform v IC & O'Brien [2009] EWHC 164 (QB); [2011] 1 Info LR 1087

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal. Accordingly, it does not require Bristol City Council to take any steps.

Dated this 18th. day of March, 2013

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

Introduction

1 Bristol City Council ("the Council") acts as a Commons Registration Authority ("CRA") under the Commons Act, 2006 ("the Act"). It is a major landowner in its own registration area.

2 Under the Act any person may apply to the CRA to register as a town or village green land which has been used by the public in significant numbers for sports and pastimes, "as of right", for at least twenty years. The landowner, or other interested party, may enter an objection to such registration.

3 In those circumstances, the Council, as Registration Authority, acting through the appropriate committee, must adopt an appropriate and fair procedure to determine whether the requirements of the Act are satisfied. That may involve a hearing and decision through a sub – committee with the assistance of legal advice from council officers. It may be that a determination can properly be made on the basis of documentary evidence.

4 In more complex cases, such as the one giving rise to this appeal, a CRA may appoint an independent inspector, generally experienced specialist external counsel, to hold an inquiry to determine the facts and consider submissions as to the relevant legal issues. That inspector will then report to the relevant committee exercising the council`s powers as a CRA, advising it as to whether the application should be granted. It is for the Council, as CRA, to decide whether that advice should be followed, though its rejection, without cogent justification, would be likely to lead to legal challenge.

5 Since the inspector has an advisory not a judicial role, there is no obvious obstacle to the CRA seeking a second opinion on the issues raised, as it did here.

6 Where, as is presumably quite common, given the extent of a large council`s land ownership, the council is both CRA and objector, it is plainly important

that those roles are kept distinct and that the CRA acts, and is perceived to act fairly. Some kind of procedural separation within the authority may be desirable.

The Background

7 Early in 2008 an application was made to the Council as CRA by Mr. John Button to register as a Town or Village Green around 42 acres of land at Whitchurch, The Council, as landowner, objected. It was the only objector. The issue was whether the use of the relevant land over the requisite period had been "as of right", that is to say non – violent, open and without permission, or "by right" – by the Council`s consent. That involved a careful scrutiny of the purpose for which the land had been acquired and how the Council had dealt with it over a period of about 75 years.

8 Miss Lana Wood was appointed inspector to advise the CRA. She gave directions and a three – day inquiry was held in June, 2009 at which the applicant and the Council were represented by counsel.

9 That hearing did not conclude the matter. The precise course of proceedings is irrelevant to this decision but a further public hearing took place in February, 2011.

10 Before that hearing the Council, as CRA, took further advice from external counsel and received an advice dated 31st. January, 2011.

11 In due course the CRA received a report from Miss Wood and registered the greater part of the land in question as a Town or Village Green.

The Request

12 On 17 September 2011 the Appellant made a request to the Council enquiring to what sums of money paid to two named individuals related, and

" *if they were for written legal advice(s) supplied to the CRA, please provide me with copies of those advices*". In fact, there was one advice prepared by leading and junior counsel, hence two fees.

13 On 29th. October, 2011 the Council confirmed that the payments were to leading and junior counsel for legal advice. It refused to provide a copy of the advice on the grounds that it attracted legal professional privilege ("LPP") and that the public interest required that it should not be disclosed. It relied on FOIA S.42 or, in the alternative, on EIR regulation 12(5)(b). It maintained that position by a response dated 6th.January, 2012, following a requested review.

The Complaint

14 The Appellant complained to the ICO that LPP did not attach to the advice or that, if it did, the public interest clearly required its disclosure. By his Decision Notice dated 16th. August, 2012, the ICO determined that the applicable statutory framework was not FOIA but the EIR, that LPP was engaged and that the public interest dictated that the exception be upheld and the advice withheld. The Appellant appealed.

The issues for our determination

15 There are three –

(i) Is the information requested "environmental information", as defined in EIR reg. 2(1) or information to which s.42 of FOIA applies ?

(ii) Whichever regime applies, is the material provision (FOIA s.42 or EIR reg. 12(5)(b)) engaged, having regard to the function of a CRA ?

(iii) If it is engaged, does the public interest in upholding the exception or exemption, as the case may be, outweigh the public interest in disclosure of the advice ?

The competing arguments on (ii) and (iii) will be referred to in the course of setting out our reasons for our determination.

16 We wish to make clear that the Tribunal is not concerned with arguments as to the propriety of the procedures adopted during this application, nor allegations of a conflict of interests nor professional differences between the parties. The first two matters, if worthy of further scrutiny, would be a matter for the High Court. This Tribunal is concerned only with the public`s right of access to information which, in accordance with the provisions of FOIA or the EIR, should be disclosed to it.

Nothing in this Decision amounts to a criticism of the Council, which was not joined as a party and had no voice before us.

The reasons for our decision

17 The answer to (i) is straightforward. The contrary was not argued with any emphasis by the Appellant, which is unsurprising, since FOIA s.42, unlike EIR reg. 12(5)(b) expressly provides a qualified exemption for information to which LPP attaches.

18 “Environmental information” includes information as to –

“*measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b). (reg. 2(1)(c))*

“Land” is an element or factor included in reg. 2(1)(a).

19 Any advice on the registration process will relate to measures, policies, legislation and probably plans and activities affecting land. The advice is clearly environmental information. That being so, it is exempt from disclosure under FOIA (see FOIA S.39(1)). The regimes are, for obvious reasons, mutually exclusive, as the Appellant accepted during oral argument.

20 As to (ii), there can be no doubt that the advice obtained by the CRA was privileged. Legal advice privilege certainly attached to it; it may be that it also enjoyed litigation privilege, though we do not need to make a finding on that question in resolving this issue.

21 However, reg. 12(5)(b), derived from Directive 2003/4/EC, does not employ the language of privilege. It provides an exception from the duty to disclose environmental information –

"to the extent that its disclosure would adversely affect:
- - - - -.
(b) the course of justice,- - - - - - - -".

22 The Appellant argues that the Council, as CRA rather than objector, has a quasi – judicial role performed by the relevant council committee. That committee, which obtained the advice, makes a recommendation to the full Council. It has itself no decision – making powers. That being so, neither the committee nor the Council as CRA can have any interest in future litigation, which could be adversely affected by disclosure of the advice. Their roles are respectively adviser and (quasi) judge. Reg. 12(5)(b) is not even engaged.

23 There is no doubt that the Council obtained the advice as CRA, not objector but, with due respect to an interesting argument, that is immaterial to a decision as to whether the exception is engaged.

24 In argument the Appellant was confronted with the analogy of a government department which seeks to withhold legal advice sought by civil servants who are to advise their minister. The decision as to the policy to be adopted is his/ hers not theirs. Nobody has argued, however, that the advice is therefore not privileged.

25 As to its quasi – judicial role, such is a fair description of the duty of a planning authority, which may well take internal or external legal advice when faced with a complex application. It would be surprising, once again, if it had no answer to a demand to reveal the advice which it had obtained.

26 We have been shown no authority supporting the Appellant`s significant circumscription of LPP, depending on the task that the public authority is performing.

27 As against those considerations, we agree with the ICO that the Upper Tribunal decision and guidance as to reg. 12(5)(b) in *Department of*

Communities and Local Government v IC & WR [2012] UKUT 103 (AAC) (*"DCLG")* is very much in point, both as to the application of this provision to public bodies generally and, where it does apply, to the further issue of the balancing of public interests.

28 The public authority in *DCLG* was the Planning Inspectorate ("PINS"), an executive agency of *DCLG*. One of its functions was to determine whether to hold a public inquiry of an appeal against a refusal of planning permission for the temporary erection of an anemometer to measure wind speed, or whether to limit the procedure to written representations. It obtained internal legal advice as to the procedure to be followed. Opponents of the proposed development requested disclosure of that advice, which PINS refused, relying on reg. 12(5)(b).

29 It will be apparent that PINS was performing a quasi – judicial, perhaps a fully judicial role. If its function, properly analysed, was to judge and then recommend to the Minister, then it was a blend of the judicial and the advisory. In any case, it was closely analogous to that of the CRA and the committee here. At paragraph 40 the Upper Tribunal observed –

> "*As far as we are aware it has never been judicially doubted that the same principle* (i.e., that LPP is a predominant interest) *applies in relation to advice sought or obtained by a public authority in relation to its public law rights and obligations.*"

30 In *Three Rivers v Governor of the Bank of England [2004] UKHL 48; [2005] 1 AC 610 at paragraph 36,* Lord Scott stated without qualification –

> "*It is clear...that...legal advice privilege must cover also advice and assistance in relation to public law rights, liabilities and obligations.*"

31 The proposition that a public authority exercising an advisory or quasi – judicial function cannot ipso facto have any interests which could be adversely affected in future litigation by disclosure of legal advice received is impossible to sustain. In appeals to the High Court from decisions of planning inspectors, the inspector, through the DCLG, is commonly a party. The undermining of civil servants` advice to a minister by an unrestricted public right to disclosure

of a legal opinion expressing modest reservations as to the course proposed could cripple the effective working of government.

32 More fundamentally, it is important to note that the adverse effect on the course of justice giving rise to this exception is not limited to the effect on the interests of the public authority obtaining the advice. Where it exercises a quasi – judicial function, it is perfectly possible that disclosure could damage the interests of a party to the proceedings in question, perhaps reducing its bargaining power where a settlement is contemplated. Furthermore, as the Upper Tribunal ruled in *DCLG*, the future confidence of public authorities in the confidential nature of their exchanges with their lawyers is a most important factor in determining whether reg. 12(5)(b) is engaged, as well as in the balancing of public interests, if it is.

33 We are mindful of the high threshold imposed by reg. 12(5)(b) for the operation of the exception. The Upper Tribunal in *DCLG,* at paragraph 40, endorsed the analysis in *Archer v IC & Salisbury District Council [2011] 1 Info LR 1405* that the effect must be adverse, that refusal to disclose was justified only to the extent that it was adverse and that the test is whether justice would, not could, be adversely affected. (see paragraph 51). If those hurdles are surmounted, there remains the public interest test.

34 It further identified "*the general effect which a direction to disclose in the particular case would be likely to have in weakening the confidence of public authorities generally that communications with their legal advisers will not be subject to disclosure.*"

- as a significant factor in any judgement as to adverse consequences. (paragraph 50).

35 Here the advice was obtained by the CRA on the eve of a resumed public hearing. It was a weighty document which addressed a very wide range of matters affecting the outcome of the registration process. We have no doubt that its disclosure would have shaken confidence in LPP generally. Not only the Council in this case but any public authority, learning later of a requirement to disclose, could justifiably ask - "If you cannot guarantee

confidentiality at that critical juncture, when can you ?". Reg. 12(5)(b) was plainly engaged.

36 We turn to issue (iii), the balancing of public interests. The starting point is always the express requirement in reg. 12(2) that the public authority, hence the Tribunal, apply a presumption of disclosure. Compelling reasons are therefore required, if that presumption is to be displaced.

37 The presumption reflects the invariable public interest in transparency and an insight into the workings of the institutions that govern our affairs, whether national or local.

38 Inevitably, there is a significant overlap of the factors relevant to this exercise and those discussed above relating to the application of reg. 12(5)(b). Foremost among them is the importance of LPP and the maintenance of confidence in public authorities that it will be overridden only in the most exceptional circumstances.

39 In *DCLG* the Upper Tribunal, at paragraph 55, approved first – tier decisions that the weight to be attached to this factor in EIR cases is substantially the same as those governed by FOIA. *Department of Business Enterprise and Regulatory Reform v IC & O'Brien [2009] EWHC 164 (QB); [2011] 1 Info LR 1087* confirms numerous rulings by first – tier Tribunals as to the great importance of preserving general confidence in LPP as a factor favouring a refusal to disclose, provided that proper account is taken of the presumption.

40 A factor specific to each case is the passage of time from the obtaining of the advice to the request, which will often be linked to the question whether the issues with which it deals, whether or not in the context of litigation, remain live and possibly contentious. Here, the registration process was still proceeding when the request was made in September, 2011. Although the applicant for registration eventually succeeded and may well have foreseen success by the time of the request, litigation could certainly not be discounted. Perhaps more significantly, as CRA, the Council, we were told, has received more applications under s.15 of the Commons Act, 2006 than any other. It is likely that disclosure of the advice received could substantially and adversely

affect future applications where the Council was CRA or both CRA and objector. Public justice is prejudiced where one side`s case is transparent and the other`s properly protected by confidentiality or where the CRA cannot seek further legal advice on matters relevant to the current and future applications without its publication to the world at large.

41 At the hearing, our attention was drawn to s.20(1)(c) of the Commons Act, 2006, which provides –

“(1) Any person may inspect and make copies of or any part of

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(c) any other document kept by a commons registration authority which relates to an application made at any time in relation to such a register.

((a) and (b) refer to the register and documents held by the CRA and referred to in the register)

42 It was briefly submitted that this might include privileged advice and it is right to acknowledge that, on its face, the wording could apply to a written advice. However, it is significant that the verb is “kept”, not “held”, which strongly suggests that its retention fulfils a public function. The limited scope of this provision is further demonstrated by the corresponding provision in s.21(1)(c), which provides that copies of this class of document shall be admissible in evidence to the same extent as the original. That plainly indicates that privileged advice in documentary form is not within the scope of this description.

43 Moreover, and more fundamentally, it is inconceivable that Parliament intended to override such a basic element in our legal system only for the purposes of commons registers and without making clear express provision for its exclusion.

44 We were provided with the disputed advice and read it. It contains nothing indicating any impropriety or bad faith on the part of anybody. It is a serious and thorough review of a wide range of relevant issues. Reference was made

to it in a skeleton argument submitted to the Tribunal but not the Appellant. We are satisfied that the Appellant suffered no practical disadvantage from such exclusion.

45 We held no closed session during the hearing from which the Appellant was excluded nor is it necessary to issue a closed annex to this decision.

46 For the reasons given above we dismiss this appeal.

47 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge
18th. March, 2013