IN THE FIRST-TIER TRIBUNAL **Case No. EA/2009/0117**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No. FER0231767
Dated: 26 November 2009

Appellant: Mr Graham Plumbe

Respondent: Information Commissioner

Additional Party: Hampshire County Council

Date of paper hearings: 10 March and 31 August 2010

Before
Melanie Carter
(Judge)

and

Marion Saunders
Henry Fitzhugh

Subject:
EIR Legal professional privilege reg 12(5)(b)

Cases:

DFES v Information Commissioner EA/2006/10
Archer v Information Commissioner & Salisbury District Council EA/2006/0037
Pugh v Information Commissioner & Ministry of Defence EA/2007/0055
FCO v Information Commissioner EA/2007/0092
Calland v Information Commissioner & FSA EA/2007/0136
Fuller v Information commissioner & Ministry of Justice EA/2008/0005
DBERR v O'Brien & Information Commissioner [2009] EWHC

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the decision of the Information Commissioner and dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal arises from a letter of request from Mr Philip Graham Plumbe, the Appellant, under the Environmental Information Regulations 2004 ("EIR") to the Hampshire County Council ("HCC") dated 5 September 2008. The request related to a dispute between Tylney Investments Ltd, whom Mr Plumbe represented, and HCC. During the course of the dispute, which concerns the status of a right of way that in part crosses land owned by Tylney Investments Ltd, a joint opinion was sought by Mr Plumbe's then client from George Laurence QC and Ross Crail. HCC did not agree with this legal advice and Mr Plumbe has attempted to discover the "reasons" why the Council "rejected or even doubted" the advice contained in the joint opinion.

2. On 5 September 2008 the Appellant made a request (originally under the Freedom of Information Act 2000 (FOIA)) for the following information from HCC:

> *"… a copy of the legal advice given to the rights of way section (or a statement if given orally) as a result of which the Joint Opinion of George Laurence QC and Ross Crail, both leading experts in rights of way law, has been rejected or even doubted."*

3. HCC initially refused disclosure in a letter dated 3 October 2008 placing reliance on the exception in the EIR for information, the disclosure of which may adversely affect "the course of justice" – Regulation 12(5)(b). HCC upheld the refusal on internal review in a letter dated 26 November 2008. Mr Plumbe complained to the Information Commissioner ("IC"). Following his investigation, the IC served a Decision Notice dated 26 November 2009 upholding the refusal to disclose the information ("the disputed information"). In brief, the IC decided in this case that –

(i) the disputed information was “environmental information” within the meaning of regulation 2(1) EIR;

(ii) the disputed information was subject to legal professional privilege and that regulation 12(5)(b) EIR was engaged; and

(iii) the public interest in maintaining that exception outweighed the public interest in disclosure of the disputed information.

4. Mr Plumbe appealed this decision to the First Tier Tribunal (Information Rights) (“the Tribunal”).

The Appeal

5. Mr Plumbe’s appeal fell into four main grounds of appeal:

(i) that the information requested is not “environmental information” within the terms of the EIR;

(ii) that “course of justice” in regulation 12(5)(b) EIR should not be interpreted so as to cover “circumstances where the complaint relates solely to the existence of a public right of way, and where there is no question of personal conduct involving criminal or disciplinary inquiry”;

(iii) that legal advice privilege did not apply on grounds of waiver;

(iv) the IC came to the wrong conclusion on the public interest balancing test.

6. The Tribunal had before it a bundle of documents and a witness statement from Elizabeth Ellam, Principal Solicitor to HCC. The Tribunal was provided with a copy of the disputed information. This was not however disclosed to Mr Plumbe during the proceedings as to have done so would have been to defeat the purpose of the appeal.

The Tribunal’s jurisdiction

7. This Tribunal’s jurisdiction in relation to appeals is pursuant to section 58 of FOIA. For the purposes of this appeal, the Tribunal must consider whether

the Decision Notice is in accordance with law. The starting point is the Decision Notice itself but the Tribunal is free to review findings of fact made by the IC and to receive and hear evidence which is not limited to that before the IC. In cases involving the public interest test, as here, a mixed question of law and fact is involved. If the Tribunal comes to a different conclusion on the same or differently decided facts, that will lead to a finding that the Decision Notice was not in accordance with the law.

The relevant law

8. Under regulation 5(1) EIR a public authority that holds environmental information is required to make it available on request.

9. Subject to a presumption in favour of disclosure (regulation 12(2) EIR), a public authority may refuse to disclose environmental information if an exception under regulation 12(4) or (5) EIR applies and the public interest in maintaining that exception outweighs the public interest in disclosure (regulation 12(1) EIR).

10. Regulation 12(1) of the Regulations provides that:

> *"Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –*
>
> *(a) an exception to disclosure applies under paragraphs (4) to (5); and*
>
> (b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."*

11. In so far as is relevant, Regulation 12(5) provides as follows, namely:

> *"For the purposes of paragraph (1)(a), 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 disciplinary nature;…"*

Is this 'environmental information'?

12. The Appellant's first ground of appeal was to question whether the disputed information properly fell within the definition of "environmental information" for the purposes of EIR. "Environmental information" is defined in regulation 2(1) EIR as including:

> *"any information in written, visual, aural, electronic, or any other material form on –*
>
> *(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites;…*
>
> *…….*
>
> *(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements … referred to in (a)…as well as measures or activities designed to protect those elements;…."*

13. The Tribunal had no hesitation in concluding that in light of the plain wording used in the provision above, in particular the reference to land and measures affecting land, the disputed information fell within regulation 2(1) and was subject to the EIR.

Is regulation 12(5)(b) engaged?

14. The Appellant's second ground of appeal was that regulation 12(5)(b) would not extend to circumstances such as this, namely legal advice concerning a dispute over a right of way over land. It was argued that the phrase "course of justice" (see paragraph 9 above) was not sufficiently broad to apply where the interests in question were those of a private individual (the landowner) and in the absence of any criminal or disciplinary proceedings.

15. This Tribunal, consistent with other Tribunal cases, found that the exception in regulation 12(5)(b) was intended to encompass all information subject to legal professional privilege. The Tribunal read disjunctively "course of justice" and "disciplinary or criminal matters". In its view, moreover, regulation 12(5)(b) was sufficiently broad to cover the disclosure of any information which could adversely affect a matter amenable to a legal ruling by a court, tribunal or public inquiry. In this case, the disputed information concerned a matter which, all parties acknowledged, could result in court proceedings or a public inquiry.

16. The Tribunal satisfied itself from a consideration of the disputed information that this was legal advice provided by a lawyer to his client. It was not in dispute in this appeal that only legal advice privilege as opposed to litigation privilege is relevant – there was no actual litigation ongoing or threatened at the relevant time.

17. The third ground of appeal consisted essentially of an argument that there had been a waiver of legal professional privilege. In this first regard, Mr Plumbe pointed to the fact that there had been a reference to the legally privileged disputed information in an HCC report dated 27 May 2009, which stated that:

> ***"****Advice has been sought from the County Council's Legal Practice on this issue and the conclusion is that there is certainly merit in the argument put forward by counsel, via Tylney Investments, and it might well be a correct interpretation of the effect of the 1953 Diversion Order although, in the absence of case law on this subject, it cannot be said with absolute certainty that bridleway rights do not exist".*

18. The Tribunal was satisfied that there had been no waiver of the legal professional privilege. The Tribunal noted that partial waiver did not, as a matter of law, apply to legal advice privilege, as here – its application was restricted to litigation privilege. In any event, even in the context of litigation, a mere reference to a privileged document, also as here, does not amount to a waiver of privilege.

The Public Interest Test

19. After forming a view on whether legal professional privilege applies and the exception in regulation 12(5)(b) is engaged, our task is to consider the public interest balancing test.

20. To this end, the Tribunal must consider *"all the circumstances of the case"* and to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure. The Tribunal reminded itself that regulation 12 provides a presumption in favour of disclosure. The burden of proof remains on the public authority to satisfy the Tribunal that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure (*DFES v IC* EA/2006/10).

21. In considering the public interest test it was important for the Tribunal to emphasis that it was assessing the public interest at the relevant time, that is, for the purposes of this jurisdiction, at the latest the date of the internal review, 26 November 2008. Thus, many of the matters raised by Mr Plumbe and evidence before the Tribunal was not strictly relevant.

22. The Tribunal reviewed the public interest factors considered by the IC and put forward during the appeal by the parties in order to assess whether a lawful decision had been made. One of the main arguments from Mr Plumbe was that the IC had not been privy to sufficient information in order to properly carry out the public interest balancing test. The Tribunal took the view, however, after reviewing the totality of the information before it, that the IC had had, at the date of the Decision Notice, sufficient information before it to come to an informed and reasoned decision.

Factors in favour of disclosure

23. The factors in favour of disclosing the requested information were in summary:

    (i) Disclosure would help the public to better understand the legal basis for the HCC's assertion that the legal advice contained in the joint opinion was flawed.

(ii) Disclosure would promote accountability and transparency in relation to this particular exercise of local government functions.

(iii) Also in favour of disclosure was that this would dispel one way or the other, any suspicion of misrepresentation and/or political motivation.

Factors against disclosure

24. The factors in favour of maintaining the exception are:

(i) the in-built public interest accorded to legal professional privilege. Tribunal and court cases concerning section 42 of FOIA were, insofar as they concern a similar jurisdiction to EIR with regard to disclosure of information subject to legal professional privilege, of assistance in interpreting the meaning and ambit of regulation 12(5)(b). Mr Justice Wynn Williams in the High Court case of *DBERR v O'Brien & Information Commissioner [2009] EWHC* upheld the Tribunal's approach in recognising that there is a significant in-built weight of public interest in maintaining the exemption under section 42. This is on account of the fundamental importance attached to legal professional privilege and thereby the protection of free and frank communications between lawyers and their clients. The judge stated at paragraphs 41 and 53 of the judgement:

> *"Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question".*

Thus, whilst it was not necessary for there to be "exceptional" factors in favour of disclosure, the Tribunal acknowledged that the in-built weight in the legal professional privilege exception is such that it is "*more difficult to show the balance lies in favour of disclosur*e" *(Pugh v Information Commissioner & MOD EA/2007/0055)*

The Tribunal also adopted the comments of a previous Tribunal considering regulation 12(5)(b) in *Archer v Information Commissioner & Salisbury District Council EA/2006/0037*, such that *"… there is a compelling public interest in a party being able to obtain informed legal advice in confidence, and that in order to do so, a party must be free to disclose to his adviser all relevant facts, without fear that they may later be disclosed. The risk, otherwise, is that the completeness or candour of the legal advice will be compromised, or that a party may be deterred from obtaining legal advice altogether. In the case of a public authority, it could mean that it would make decisions, using public funds, and on matters relating to investigations and enforcements, without being properly informed of the relevant legal position"*.

(ii) the fact that the disputed information consisted of legal advice which was considered still to be 'live' (in the sense of being relied upon at the relevant time). Importantly, there was a very real dispute surrounding the right of way at the relevant time. From the evidence before the Tribunal it appeared that there had been a likelihood of either litigation or a public inquiry. This heightened the public interest factors against disclosure.

Application of the public interest test

25. The Tribunal gave careful consideration to where the public interest lay. It was particularly concerned, whilst acknowledging the significant in-built public interest in maintaining the exemption in regulation 12(5)(b), not thereby to, in effect, treat this exemption as absolute.

26. The starting point in regulation 12(5)(b) exception cases was the significant weight to be given to the in-built public interest in maintaining the legal professional privilege exemption.

27. The Tribunal agreed with the IC and the HCC that in addition to the in-built weight to the public interest in maintaining the regulation 12(5)(b) exception, a specific further factor against disclosure was that the legal advice was, at the relevant time, 'live'. This was both in the sense that it was relied upon and

that there was a real risk of litigation or public enquiry. This factor added to the in-built weight meant that there was considerable public interest in maintaining the exception for legal professional privilege in this case.

28. In favour of disclosure, the Tribunal accepted that there was public interest in reassuring the public that this matter was being handled appropriately and in dispelling any suspicion that the public had been misled. On this, the Tribunal noted that Mr Plumbe was not alleging bad faith in anyway, rather that certain points of information put into the public domain had been incorrect. For the avoidance of doubt however, there was no evidence before the Tribunal that the public had been misled and wished to reassure Mr Plumbe that the disputed information was unsurprising in nature and did not contain any material which gave rise to concerns as to the propriety of HCC's actions.

29. In favour of disclosure was the public interest in better understanding the issues giving rise to the dispute over the right of way. However the Tribunal agreed with the IC that this issue did not affect a large number of people or involve significant sums of public funds. The interest of the public was therefore of a limited nature.

30. The Tribunal accepted moreover the view put forward by the witness in this case, Elizabeth Ellam that, in effect, the public interest in transparency and accountability could in part be met through the normal local government processes for scrutiny and accountability:

> *"The public interest in this case refers to the public having confidence that rights of way matters are dealt with in accordance with the law. Scrutiny and accountability are achieved by way of officer recommendations as to the recording of public rights of way on the Definitive Map and Statement being made in the open and accountable way to the Regulatory Committee who can resolve, on the evidence before it, to make or not make Orders. If such Orders are then made there will be further public debate and if objections are received it is likely that there will be a statutory public inquiry".*

31. Whilst not binding, the Tribunal found useful the indications from differently constituted Tribunals of the sorts of factors that might constitute a public

interest in favour of disclosure that equalled or outweighed the significant in-built public interest arising in section 42 cases. Thus, in the case of *Fuller v Information commissioner & Ministry of Justice* EA/2008/0005, it was said at paragraph 12:

> *"There will be some cases in which there could be stronger contrary interests; for example, if the privileged material discloses wrongdoing by or within the authority or a misrepresentation to the public of the advice received or an apparently irresponsible and wilful disregard of advice, which was merely uncongenial".*

32. A differently constituted Tribunal in the case of Calland v Information Commissioner & FSA EA/2007/0136 stated that *"some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential".*

The Tribunal was of the view that such a justification did not exist in this appeal. In all the circumstances, the Tribunal was of the view that the public interest in maintaining the exception outweighed the public interest in disclosure.

Conclusion

33. The Tribunal upheld the IC's Decision Notice and dismissed the appeal.

34. Our decision is unanimous.

Signed:

Melanie Carter

Tribunal Judge Date: 10 September 2010