



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2015/0236

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50586791
Dated: 16 September 2015**

Appellant: Steve Clark

Respondent: The Information Commissioner

Heard at: Portsmouth Magistrates Court

Date of Hearing: 10 March 2016

Date of Promulgation 29th March 2016

Before

Chris Hughes

Judge

and

Henry FitzHugh and Paul Taylor

Tribunal Members

Date of Decision: 25 March 2016

Attendances:

For the Appellant: Mr Clark assisted by Mrs Fowser

For the Respondent: no attendance

Subject matter:

Regulation 12 (5)(b) Environmental Information Regulations 2004, the course of justice

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 16 September 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The South Downs National Park Authority (SDNPA) is responsible for the South Downs National Park (SDNP). It has two statutory purposes: -
 - To conserve and enhance the natural beauty, wildlife and cultural heritage of the area.
 - To promote opportunities for the understanding and enjoyment of the special qualities of the National Park by the public
2. One way it does this is as the planning authority for SDNPA which came into existence on 1 April 2011. The effect of this is that although the SDNPA lies across a number of local authority areas which under normal circumstances would be responsible for considering planning applications and taking enforcement action in the case of breach of planning control, those functions, for land within the Park area, are vested in SDNPA.
3. In conjunction with one of the local authorities in its area (Hampshire County Council, "HCC") it developed a plan to upgrade the Meon Valley Trail, a former railway line within the HCC part of SDNPA.
4. The implementation of this plan caused some local controversy. There was criticism that local people were not sufficiently informed or consulted about the project and a

Face book campaign attracted 2,600 supporters. There was concern that there had been no planning application in connection with this project.

The request for information

5. The Appellant in these proceedings (“Mr. Clark”) was involved in this campaign. One of his colleagues in the campaign was in contact with the Principal Planning Officer at Winchester City Council who wrote to her on 27 April 2015:-

“Further to my e-mail to you earlier today, I have now received a copy of the legal advice which was provided by one of Hampshire County Council’s solicitors to the South Downs National Park Authority (SDNPA). The works are considered to be permitted development – which means an application for planning permission was not necessary.”

6. The same day Mr Clark contacted SDNPA requesting the advice:-

1) I would like a copy of the legal advice provided by HCC solicitors to the South Downs National Park regarding the current work being carried out on the Meon Valley Trail. For the avoidance of doubt, this is likely to have been done in 2014 or 2015. The MVT is a joint project by HCC and SDNP.

2) Please also provide copies of any relevant emails to and from the relevant SDNP solicitors or others to their counterparts at HCC or Winchester City Council.

7. This was refused by email on 28 April, which indicated that the requested information was exempt under section 42 (Legal Professional Privilege) of the Freedom of Information Act 2000. Mr Clark requested an internal review in an email dated 3 June. On 5 June, following some internal confusion which led to SDNPA denying that it held any such advice, the Director of Corporate Services for SDNPA confirmed to Mr Clark:-

“..the legal advice you have referred to was in fact not provided by Hampshire County Council Solicitors to the South Downs National Park Authority, but rather to another Hampshire County Council Department. The advice was then sent on to the SDNPA by an officer of Hampshire County Council”

8. The email went on to explain that in reliance on Regulation 12(5)(b) of the Environmental Information Regulations (“EIR”) SDNPA had concluded that disclosure of the legal advice would have an adverse effect on the course of justice.

The legal professional privilege in the advice was to ensure fairness in legal proceedings. The confidentiality between a client and a legal adviser was not waived by reason of the very limited sharing of advice between HCC and SDNPA with a common interest in the advice and in the contemplated litigation. While acknowledging the argument in favour of disclosure in the interests of transparency SDNPA concluded that the public interest was served by not disclosing the legal advice.

The complaint to the Information Commissioner

9. Mr Clark complained to the Respondent Information Commissioner (“ICO”) who investigated. In his decision notice he recorded the account of SDNPA of what had been done (DN paragraph 10):-

“Access for people using the trail has been improved by the removal of mud and debris and the restoration of the track’s surface. Better access points on the trail have been created. Some trees have been removed or coppiced to improve public safety, to open up views and to create a diverse habitat more in keeping with the South Downs. The legal rights for people to use the Trail will be formalised to protect future public access.”

He also recorded criticisms from some members of the public (DN paragraph 11)

“insensitive to the environment...urbanisation of a beauty spot the type of surface put down has made use of the Trail more difficult and even dangerous”

10. The ICO then considered the application of Regulation 12(5)(b) of EIR which enables a public authority to refuse to disclose information whose disclosure would adversely affect:-

“the course of justice, ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal nature”

11. He noted that the advice had been shared between the public authorities on a confidential basis and had not been disseminated beyond the relevant public authorities. He also noted the view of SDNPA that wider disclosure would undermine the concept of legal professional privilege and the substantial risk of legal challenge to the carrying out of the work on the Meon Trail meant that disclosure could disadvantage SDNPA in proceedings. He concluded that the exemption was engaged.

12. In weighing the public interest the ICO noted Mr Clark's view that there had been a lack of real consultation, concern about the decision-making and his view that the legal basis was weak. Against this he weighed the public interest in legal professional privilege, the information SDNPA had already provided Mr Clark about the project and the consultation before it and the view that providing the legal advice would not significantly enhance public understanding.
13. The ICO, in balancing these considerations noted that there should be a clear and compelling case for breaching legal professional privilege; the advice was recent and still relevant to the decisions being made by the public authorities. He also noted the presumption in favour of disclosure but concluded that the interests of fairness meant that SDNPA should not be forced to reveal the substance of legal advice which could potentially be exploited by others and the information should not be disclosed.

The appeal to the Tribunal

14. In his appeal Mr Clark argued for disclosure on the basis that the project work affected a large number of people along the ten miles of the route and that the situation brought the planning system into disrepute, which was a "clear, compelling and specific justification for breaching the confidentiality." He noted that a similar project to this one, the Centurion Way in Sussex, had been subject to a planning application.
15. In his response to the appeal the ICO relied on and developed the arguments in his Decision Notice. He argued that interest in disclosure is weak where it simply enables the requester to understand the legal arguments relevant to the issue. He considered that the continued future use of the advice and the possibility of challenge to the decision-making were strong arguments in favour of withholding the information and it was important for public authorities to be able to freely exchange views with their legal advisors without fear of intrusion.

Oral proceedings

16. In the hearing the conduct of SDNPA was criticised for its lack of consultation and its response to criticism. The standard of the works was compared unfavourably with the works on the Centurion Way, which showed the value of the planning system. If the

works had been to the standard of Centurion Way there would have been no need for the hearing. The work was stated to be badly managed and rushed. Photographs were produced illustrating the campaigns concerns about safety and access for those with disabilities. A conversation with a senior manager of SDNPA was described in which he was reported to have acknowledged that greater openness in the process would have been helpful.

17. One significant point raised by Mr Clark in his notice of appeal upon which he based reliance in the hearing was due to a misunderstanding of the legal framework for planning applications and enforcement within the SDNPA:-

“Neither SDNP nor HCC acting jointly or separately have...applied for planning permission for its work on the Meon Valley Trail (which includes going through a conservation area), yet it seems no enforcement action can be taken or the matter even investigated by Winchester City Council because WCC is acting on behalf of the SDNP.

This issue is important because it has the likelihood of bringing the whole planning system into disrepute. The SDNP has wide-ranging planning administration powers over businesses and home-owners in its area of jurisdiction, yet it seems... to follow its own rules or policies and central government legislation when it comes to its own projects. UK law relies on the convention that no one is above the law and that laws should apply equally, yet this is at odds with these action[s].

I do believe that this is a point of great importance and is a “clear, compelling and specific justification for breaching the confidentiality” as it could lead to others deciding that “if the SDNP does not need to apply for planning permission then I won’t”. A public body or local authority cannot be seen to be ignoring the very rules and laws which it imposes or enforces on others.”

18. It is necessary to tease out the structural issues from the legal issues. Although the structure is somewhat more complex, (for example officers in WCC acting on behalf of SDNPA for some planning issues) the essential legal framework is the same inside the SDNPA and elsewhere. The planning authority decides planning applications. If the planning authority intends to carry out some form of development within its area, then like any person or organisation it needs to consider whether it needs planning permission or not. If it does then it has to apply for it just like everyone else. Then,

as with other planning authorities which apply to themselves for permission, it needs to determine that application fairly and impartially. The position of the SDNPA is the same as that of any other local planning authority. As a potential applicant for planning permission it is in the same position as other applicants. The added complexity of local arrangements within a National Park does not change the essence of the system which applies across the country.

19. In his appeal Mr Clark was unsurprisingly somewhat confused by this picture, however in response to a question from the tribunal Mr Clark confirmed the key argument in his appeal that it was important to know “if the legal advice showed they did need to get planning permission”. The campaign had approached a barrister for advice (dated 29 May 2015) which argued that planning permission should have been obtained for the work. The campaign had felt frustrated at what it saw as the intransigence of SDNPA and its aggressive briefing of the media and threatened to take legal action; but had not had the resources to do so.

Consideration

20. There were three main threads to the argument before the tribunal, the failings of consultation with local residents, concern about the quality and safety of the work and the question of the lawfulness of the works without planning permission. The tribunal fully understands the concern which has arisen in this case and the feeling that was articulated that because the public were not fully and appropriately engaged, the works were not as suitable as they would otherwise have been; certainly the perception of the quality and suitability of the works will have been affected by the apparent absence of positive engagement. Those perceptions include concerns about how effective access is for those with disability and the potentially hazardous presence of the detritus of the railway in the aggregate forming the path. The tribunal has taken into account these arguments for disclosure in weighing the public interest.
21. It is not for this tribunal to consider whether or not planning permission was needed. The campaign group obtained advice on 29 May 2015 stating that planning permission should have been obtained. It should be noted that the email which disclosed the existence of the advice on 27 April 2015 also stated that the advice confirmed that planning permission was not needed. The closed material does not in any way indicate that the SDNPA acted against legal advice and is entirely consistent

with the account SDNPA gave to the ICO on 3 August 2015. While Mr Clark is looking for proof of deliberate illegality and misconduct by SDNPA in ignoring legal advice, there is no such “smoking gun”.

22. However the existence of two conflicting pieces of legal advice so close together in time throws into sharp relief the issue of prejudice to the course of justice. By the time SDNPA had properly identified the legal advice in question on 5 June 2015 it was facing potential legal action threatened by the campaign group. The legal advice went to the heart of the subject matter of the potential litigation; whether planning permission was needed or not, this directly related to the course of justice. The disclosure of the legal advice would have created an advantage for a challenger and so have prejudiced the ability of SDNPA to receive a fair trial of this highly contentious issue which was reasonably apprehended at the time. Furthermore the disclosure of the advice would have had wider implications for the confidence which public bodies can have that they can consider their legal position with their legal adviser in confidence. The prejudice to the public interest is immediate and substantial.
23. The interests in disclosure are in comparison not weighty. Knowing that there are two sides to a legal argument is not a great advance in public understanding, especially when litigation is threatened, since everyone is entitled to seek legal advice; why should one side have access to the advice of another. Disclosure would similarly not help in understanding the quality of the works or the quality and extent of the consultation.
24. The balance in this case can only be struck in one way; that the public interest supports non-disclosure. The tribunal is satisfied that the decision of the ICO is correct in law and dismisses the appeal.
25. Our decision is unanimous

Tribunal Judge

Date: 25 March 2016