



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0124

**Decided without a hearing
On 6 November 2018**

Before

**JUDGE ANTHONY SNELSON
JEAN NELSON
ALISON LOWTON**

Between

MR NORMAN FEARN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

DECISION

The unanimous decision of the Tribunal is that the appeal is dismissed.

REASONS

Introduction

1. The Appellant, Mr Norman Fearn, to whom we will refer by name, is a resident of Chalfont St Peter in Buckinghamshire. On 10 August 2017 he wrote to Chalfont St Peter Parish Council ('the Council') requesting information

about a legal case brought by it in 2016 against Holy Cross Sisters Trustees Incorporated ('the litigation'), in these terms:

- [1] What costs have been incurred so far in this lawsuit?
- [2] What further anticipated costs are included in the budget as the action proceeds?
- [3] What provision has been made for a possible award against the Council if liability for the [respondent's] costs is imposed on the Council.

The litigation continues and a trial has been set for early in 2019.

2. The Council replied on 7 September 2017. It provided information in response to question [1], gave a partial response to question [2] and refused to provide the remainder of the requested information, citing the Freedom of Information Act 2000 ('FOIA'), s42(1) exemption, which applies to information covered by legal professional privilege ('LPP').
3. Mr Fearn was dissatisfied but, following a review, the Council confirmed that its position was unchanged.
4. By a letter of 20 September 2017 Mr Fearn complained to the Respondent ('the Commissioner') about the way in which the Council had dealt with his request.
5. The Commissioner proceeded to carry out an investigation. This took the form of considering the written representations of Mr Fearn and the Council's responses to a number of questions formulated by the Commissioner.
6. By a decision notice dated 31 May 2018 the Commissioner determined that the Council had correctly applied the FOIA, s42(1) exemption to withhold the disputed information.
7. By a notice of appeal dated 21 June 2018, Mr Fearn contended that the Commissioner's decision was wrong. The essence of his challenge is to be found in para 5 of his grounds, which reads as follows:

I have contended that information about possible future costs should not be secret. It cannot affect the legal argument any more than actual cost to date, some of which has been disclosed. As a parishioner I am entitled to know. For a Parish Council this expenditure is very large, the motive is unclear and the action offers no apparent benefit to the Council or the parishioners. It is noticeable that the chief beneficiary of the secrecy will be the solicitor who recommended it.

8. In her decision notice the Commissioner determined that the disputed information under paras [2] and [3] of the request engaged the exemption under FOIA, s42(1) and that the public interest arguments in favour of maintaining the exemption outweighed those in favour of disclosure.

The applicable law

9. By FOIA, s42(1) it is provided that:

Information in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings is exempt information.

The word “could” is significant. We are concerned with a class-based exemption: it applies without more if the requested information is *capable* of attracting legal professional privilege, but where it is engaged, the exemption is not absolute, and accordingly the Tribunal must go on to perform the balancing exercise under FOIA, s2(2)(b), weighing the competing public interests in maintenance of the exemption on the one hand and disclosure of the information on the other.

10. LPP is a cardinal feature of our law of procedure. It takes two forms: legal advice privilege and litigation privilege. The latter is in play here. Its rationale was stated by Lord Jessel MR in *Anderson v Bank of British Columbia* (1875-1876) LR 2 ChD 644 at 649 in these terms:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret ...

11. The public interest test was discussed by Upper Tribunal Judge Markus QC in *Willow v (1) Information Commissioner and (2) Ministry of Justice* [2016] UKUT 0157 (AAC). Her decision included this passage:

16. On behalf of the Appellant, Mr Wise QC submits that the First-tier Tribunal’s decision as to public interest was irrational because it was not supported by evidence. He submits that it was based on speculation as to the respective harms or benefits of disclosure rather than weighing actual harm and actual benefits based on evidence of actual harm. He relies on the decision of the three judge panel of the Upper Tribunal in *APPGER v Information Commissioner and Foreign and Commonwealth Office* [2013] UKUT 560 (AAC) addressing the nature of the public interest decision in relation to a qualified exemption (in that case, section 27 FOIA):

“75. In our view correctly, it was accepted before us by the FCO and the IC that when assessing competing public interests under section 27 of FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote...

76. Such an approach requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice and (b) benefits that the proposed disclosure of the material in respect of which the ... exemption is claimed would (or would be likely to or may) cause or promote. Plainly that includes an identification of the relevant material and the circumstances in which it was provided to or obtained by the body claiming the ... exemption."
17. This does not mean, however, that there must be evidence of harm having occurred. The nature of the assessment is that it will often involve predictions as to what will or is likely to happen in the event of disclosure. "Actual harm" and "actual benefit" includes, respectively, risk of actual harm and real chance of benefit: *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC) at [25]. As Upper Tribunal Judge Jacobs said in *London Borough of Camden v Information Commissioner and YY* [2012] UKUT 190 (AAC) at [11], "the tribunal should take account of any consequences that can readily be anticipated as realistic possibilities."
12. The appeal is brought pursuant to the Freedom of Information Act 2000, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:
- (1) If on an appeal under section 57 the Tribunal consider -
- (a) that the notice against which the appeal is brought is not in accordance with the law; or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Analysis and conclusions

13. There appears to be no dispute that s42(1) is engaged and that the relevant form of privilege is litigation privilege. The crux of the case is the disagreement about where the public interest lies.
14. It is convenient to start by making one observation about the scope of the information sought, in so far as it is disputed. It seems to us that there may be a degree of ambiguity about para [2] of the request. The 'budget' could be read as referring to the costs budget for the litigation referred to in the request, prepared in accordance with the Civil Procedure Rules, rule 3.13, or to the Council's annual financial budget. The Council appears to have understood the request to have been directed to the costs budget. But if it was intended to be wider, nothing seems to turn on the misunderstanding because, in the course of the investigation, the Commissioner directed questions to the

Council concerning the financial budget for 2018/19, eliciting the response that, at the time of writing, its budgets for that year had not been agreed and accordingly the information asked about was not held. That perfectly plausible answer is not, as we understand it, challenged and if it was, we would reject the challenge, seeing no good reason to uphold it. In the circumstances, we proceed on the footing that the only request (or the only relevant request) under para [2] is for information about the costs budget in respect of the litigation.

15. Turning to the public interest balance, we accept that there is a strong public interest in disclosure of the information sought. One aim of FOIA is to enable citizens to hold public authorities to account. Their ability to do so is impaired if they do not have access to key material. Openness and accountability are inevitably diminished if organisations are free to withhold important information and documents. Moreover, secrecy may be a cloak for (among other things) careless or ill-judged custodianship of public funds.
16. On the other hand, the importance of LPP cannot be overstated. The public interest in maintaining an effective legal system is self-evident and privilege is a vital feature of any such system.
17. In our judgment, the Commissioner's arguments must be preferred to those of Mr Fearn. It seems to us that a broad benefit/risk analysis argues for maintaining the exemption. Compelling disclosure would involve the risk of undermining the Council's litigation strategy and giving its opponents a practical, or at least psychological, advantage. Disclosure would be liable to expose to public gaze the Council's assessment of its own prospects in the litigation and, by implication, the trend or broad effect of advice received from its legal team. In so far as that weakened its position in the litigation, there would be prejudice to the public interest in ensuring an effective legal system which places parties to litigation on an even footing with one another and inspires public respect and confidence. There might also be a more specific financial prejudice to a narrower section of the public, namely the local community, if disclosure disadvantaged the Council in the litigation and resulted in it achieving a poorer outcome than it would if the exemption were maintained.
18. By contrast, Mr Fearn would not be significantly disadvantaged if the exemption were maintained. He has been given access to important information, including the costs incurred to date, on the strength of which it is open to him to continue to press his concerns with the Council. He can, on the basis of the information he holds, make his own assessment (supported, if he wishes, by independent expert opinion) of the costs exposure of the Council, and question its stance in the litigation. In short, he is free to exercise in a meaningful way his democratic right to challenge his parish council to justify its conduct in the legal proceedings. If and in so far as disclosure would

strengthen his hand in doing so, our decision may disappoint him, but it is as well for him to bear in mind, as we do, that the citizen does not have the right to impose his or her will upon elected bodies in their lawful activities, including the conduct of litigation. Rather, the democratic process entitles him or her to press for an explanation for decisions taken on the public's behalf and, at the hustings, to punish an administration for any failure (real or perceived) to serve the best interests of the electorate.

19. Developing the last point, we attach particular importance to the timing of Mr Fearn's request. It concerns current litigation. Therein lies the real risk of significant prejudice to the public interest should the requested information be disclosed. We consider that there is no strong public interest in the information being disclosed *now*. It is not in the public interest for citizens to be able to influence litigation strategies of public authorities by use of information normally and for very good reason regarded as entirely confidential. We would regard a case of a retrospective request for information such as Mr Fearn's, made after the relevant litigation was at an end, as a different proposition. This is not to imply a view as to how the Tribunal would decide such a case, only to make the point that the powerful public interest argument based on possible prejudice to current litigation would not be available to the public authority and, for that reason, its resistance to disclosure would be less compelling.
20. It follows that the appeal must be dismissed.

(Signed) Anthony Snelson

Judge of the First-tier Tribunal

Dated: 11 December 2018

Promulgation date: 17 December 2018