Neutral citation number: [2024] UKFTT 857 (GRC)

Case Reference: FT/EA/2024/0073

First-tier Tribunal

General Regulatory Chamber

Information Rights

Determined, by consent, on written evidence and submissions.

Considered on the papers on 26 July 2024.

Decision given on: 25 September 2024

Before

TRIBUNAL JUDGE Stephen Cragg KC

TRIBUNAL MEMBER Pieter De Waal

TRIBUNAL MEMBER David Cook

Between

HUGH BROWN

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) LONDON BOROUGH OF HARROW

Respondents

Decision: The appeal is Dismissed.

Substituted Decision Notice: No substituted decision notice.

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

2. The Tribunal considered an open bundle of evidence, a closed bundle and submissions from the parties.

BACKGROUND

3. On 28 July 2023 the Appellant requested information as follows from the London Borough of Harrow (the Council):-

> Harrow Council, along with several other local authorities, recently took legal action to challenge the Mayor of London's plans to extend the Ultra Low Emission Zone (ULEZ). Today, 28th July, the High Court ruled that the ULEZ expansion was lawful and within the Mayor's powers.
>
> In relation to the legal action taken, please could you provide me with the following information:
>
> 1. All legal advice provided to the Leader of Harrow Council. I would expect this to include (but not be limited to):
>
> a. All advice from Harrow Council's internal legal team (including documents as well as emails correspondence)
>
> b. All advice from any external legal expertise commissioned by Harrow Council (including documents as well as emails correspondence)
>
> c. All advice on the specific grounds for the legal challenge (including documents as well as emails correspondence)
>
> d. All advice on the likelihood of the High Court upholding the legal challenge in the favour of Harrow Council (including documents as well as emails correspondence)

2. Discussion of legal advice:

a. All email correspondence between the leader of Harrow Council and both internal and external legal advisors, that discuss the advice, including the merits of the legal action and the likelihood of the success of that legal action.

3. The following cost information:

a. Forecast/estimated costs to Harrow Council of the legal challenge, including both internal and external costs

b. The amount approved by Harrow Council to spend on this legal challenge

c. The actual costs of the legal challenge, including:

i. Internal costs

ii. External costs (including but not limited to legal fees and communications)

4. The Council responded on 22 August 2023. It stated that it held information within scope of parts 1 and 2 of the request, however it was withholding the information because it is subject to Legal Professional Privilege (LPP). In respect of part 3 of the request, the Council provided information within scope of parts 3(c)(i) and (ii) and gave a narrative explanation as to why full costs of the legal challenge are not yet known.

5. The Council offered the following public interest test arguments for withholding information which it said was covered by LPP:-

> The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP - safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which - in turn - is fundamental to the administration of justice. There are no specific, clear, and compelling public interest considerations here that outweigh the public interest in protecting the information. Any public interest in the ULEZ challenge is fully met by information already in the public domain about the outcome of the case and the publication of the High Court judgment.

6. On 4 September 2023, the Appellant wrote to the Council to request an internal review. In the request, the Appellant referenced the Commissioner's guidance on when information subject to LPP can no longer be considered confidential, and stated the belief that the information did not fall to be considered as privileged as the Deputy Leader of the Council had made a comment on social media concerning the legal challenge's chance of success. The Deputy Leader's comment was that 'The court case was absolutely not

'vexatious'. And the 5 Councils were advised by their Counsel that there was a reasonable chance of success'.

7. The Appellant also reiterated the request for information within scope of parts 3(a) and (b) of their request.

8. Following an internal review the Council wrote to the Appellant on 28 September 2023. It stated that it was maintaining its position with regard to parts 1, 2 and 3(c)(i-ii) of the request and stated that information within scope of parts 3(a) and (b) of the request was not held. The Appellant complained to the Commissioner

THE DECISION NOTICE

9. In a decision notice dated 1 February 2024 the Commissioner first decided that the information sought was 'environmental information' (which is not disputed) and that the applicable exception to consider was to be found in regulation 12(5)(b) of the Environmental Information Regulations 2006 (EIR). This provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect 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 or disciplinary nature.

10. The Commissioner noted that the exception is not limited to information which is subject to legal professional privilege ('LPP'). Even if the information is not subject to LPP, it may still fall within the scope of the exception if its disclosure would have an adverse effect upon the course of justice or the other issues highlighted.

11. The Commissioner stated that:-

> 18. Having considered the withheld information the Commissioner is satisfied that it contains confidential communications between a client and a professional legal advisor, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.

12. In respect of the Appellant's case that the requested information was no longer privileged as the Deputy Leader of the Council had made reference to it in a public forum, the Commissioner reproduced the Council's position as follows:-

> There has been no waiver of privilege, and we have made clear that the public statement from the Deputy Leader of the Council on social media, on 29 July 2023, said only that the legal case was not vexatious and that the councils had been advised by counsel that there was a reasonable chance of success. No documents or correspondence, or any substantive details whatsoever of the legal advice sought and received, were disclosed and, therefore, this statement clearly does not amount to a disclosure of the substance of the information sought, and does not constitute a waiver of legal professional privilege by the Council

13. The Commissioner accepted the Council's position that the substance of the material captured by parts 1 and 2 of the request had not been disclosed to the public via the social media statement made by the Deputy Leader of the Council, and therefore the information remains protection by LPP. The Commissioner was satisfied that disclosure of the requested information sought at parts 1 and 2 of the request would have an adverse effect on the course of justice. The Commissioner attributed particular weight to this position when factoring in the recency of the Council's High Court appeal and the sustained public debate around ULEZ, and decided that the exception at regulation 12(5)(b) is engaged (paragraphs 20-23 of the decision notice).

14. In relation to the public interest test that then needs to be applied, the Commissioner concluded that:-

> 26. The Commissioner considers that there is a strong public interest in allowing clients to speak freely and frankly with their legal advisers on a confidential basis. This is a fundamental requirement of the legal system. The ability to do so provides informed decision making and ensures that local authorities make legally robust decisions.
>
> 27. The Commissioner accepts that, where the actions of the Council had the potential to affect a large number of people, as in the case of the ULEZ legal challenge, an argument can be made for there to be proportionate transparency, which might include the disclosure of information subject to LPP. In this case, the Commissioner has no evidence that the specific subject matter of the request is of significant interest to the public to the degree that it overrides the public interest in maintaining the exception. He considers that broader public interest in ULEZ matters has been met by information already made public via the High Court Judgement, and in the surrounding media coverage. Conversely, he considers there is a strong interest in allowing the Council to seek legal advice in support of its broader statutory responsibilities without this being undermined.

15. In relation to the other information sought the Commissioner said:-

29. In respect of the information sought by parts 3(a) and (b)5 of the request, the Commissioner asked the Council to detail the searches it had undertaken when responding to the request.

30. The Council stated:

"We have asked our Finance officers, including our Director of Finance, who advised that we had not set aside any specific reserves for the ULEZ case and that the total cost would be funded from the Council's revenue budget and general contingency."

31. Consequently, the Council maintains that the request information is not held.

32. The Commissioner considers that the narrative explanation provided by the Council gives a reasonable account of why forecasted costs and details of Council approved amounts are not held.

33. The Council also provided further information within scope of parts 3(c)(i) and (ii) of the request, concerning that actual costs of the legal challenge:

"i. Internal costs

The internal officer time was dealt with under existing budgets. However, we can confirm that HB Public Law recorded 50.5 hours on the ULEZ case.

ii. External costs (including but limited to legal fees and communications)

The external spend was £151,755.20 (including VAT). This was Harrow's contribution as the costs were shared with the other boroughs."

34. The Commissioner considers that the Council has provided all of the information it holds within the scope of parts 3(a),(b) and (c) of the request.

LEGAL FRAMEWORK

16. The relevant parts of regulation 12 EIR read as follows:-

12.— Exceptions to the duty to disclose environmental information
(1) 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) or (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.
(2) A public authority shall apply a presumption in favour of disclosure.
(3) …
(4)…
(5) 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 or disciplinary nature".

17. Where information is subject to legal professional privilege (LPP), the exception in regulation 12(5)(b) EIR is likely to be engaged: *DCLG v IC* [2012] UKUT 103 (AAC). The Upper Tribunal (UT) agreed with arguments that '…it would be possible to conclude that the course of justice would not be adversely affected if disclosure were to be directed only by reason of particular circumstances, (eg that the legal advice is very stale), such that there would be no undermining of public confidence in the efficacy of LPP generally' and 'whether [regulation]12(5)(b) is engaged, in the case of information protected by LPP, must be decided on a case by case basis'.

18. At paragraph 50 of the decision, the UT also said that:-

> … in determining whether disclosure "would adversely affect the course of justice", the IC or tribunal is not limited to considering the effect (if any) on the course of justice in the particular case in which disclosure is sought. The IC can and must take into account 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 advisors will not be subject to disclosure. In our judgement that submission is correct.

19. The Commissioner's guidance explains[1] that 'in an FOI context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered confidential'.

20. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the Information Tribunal described LPP as:

> ...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.

[1] https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/

21. If LPP is applicable to the withheld information, there is case law which deals with the subsequent application of the public interest test to such information, developed in relation to section 42 of the Freedom of Information Act 2000 (FOIA), which contains a specific exemption from disclosure where LPP is applicable. Thus, in relation to the application of the public interest test in s42 FOIA cases, in *DBERR v O'Brien v IC* [2009] EWHC 164 QB, Wyn Williams J gave the following important guidance:-

> 41. … it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA . 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.
>
> 53…..The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

22. Further, in *Corderoy and Ahmed v Information Commissioner, A-G and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted as follows in emphasising that the s42 FOIA exemption is not a blanket exemption:-

> 68. The powerful public interest against disclosure … is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute.

THE APPEAL AND THE RESPONSES

23. The Appellant's appeal is dated 29 February 2024. The Appellant takes issue with the fact that the Commissioner did not consult with him before finalising the decision notice, but did seek the Council's views.

24. Substantively, his first main point is that 'In making its decision, the ICO has not adequately considered whether the public disclosure by Harrow Council's Deputy Leader constitutes the substance of legal advice received'. He states:-

> My complaint relied on ICO Guidance that is unambiguous in setting out the circumstances when a public authority cannot claim LPP, and is a like-for-like match of the scenario my complaint is based on. ICO Guidance states:
>
> > "For example, an employee of the public authority relies on legal advice the authority has received, and reveals its substance when speaking in public. As a result, the information can no longer be regarded as confidential, and the public authority would not be able to claim LPP."
>
> Had Harrow Council continued not to disclose any information regarding its chances of success, the example from the ICO Guidance would not have applied. However, Harrow Council, through its Deputy Leader, disclosed that they'd received legal advice that they had a "reasonable chance of success".
>
> Given that they have disclosed this information, the key question in relation to the example given in the ICO guidance, is:
>
> > • Does the Deputy Leader's public statement of there being a "reasonable chance of success" constitute the substance of the advice? If it does, then according to the ICO guidance, LPP cannot apply.
>
> In my request for an internal review, I argued that the Deputy Leader's statement, of there being a "reasonable chance of success" did in fact constitute the substance of the advice.
>
> In its internal review, Harrow Council relied on the argument that the 'details' had not been disclosed. However, the substance and the detail are two very different things, and no reference was made to 'substance', therefore Harrow Council's internal review did not offer any counter to my argument that the substance had been disclosed.
>
> Given that Harrow Council made no attempt to counter my argument of the substance being disclosed, I believed this to be a tacit acknowledgement, through omission, that the substance had indeed been disclosed; I therefore believed it would be a clear-cut case for the ICO, and was quite surprised by the ICO's decision.
>
> Paragraph 19 of the Decision Notice, quotes Harrow Council as follows:
>
> > "No documents or correspondence, or any substantive details whatsoever of the legal advice sought and received, were disclosed and, therefore, this statement clearly does not amount to a disclosure of the substance of the information sought."
>
> This is significantly different to their internal review:
>
> > • The internal review stated that the 'detail' had not been disclosed

• Their ICO submission stated that 'no substantive details' were disclosed

This was a new argument and was the first time they had refuted that the Deputy Leader's statement was a disclosure of substance. The first time I had seen this argument was when I read it in the Decision Notice.

25. In relation to public interest arguments, the Appellant says:-

While the Mayor of London's ULEZ policy has been widely and publicly debated in recent months, locally in Harrow (where I live) there has been much debate about the motivations and costs of Harrow Council's legal action. While some people held the view that legal action was worthwhile, others believed and continue to believe that there was minimal chance of success and that the decision to take legal action was politically motivated (noting that the London Borough councils taking joint legal action are all Conservative controlled). In Harrow, at a time when council budgets are stretched, there has been considerable debate about whether the costs of taking such legal action were justified by chances of success. Any public body is duty bound to consider value for money when making spending decisions, and while Harrow Council was entitled to make its own decision on whether the legal costs were justified given the chances of success, I believe there must be accountability and transparency of that decision. Indeed, the ICO works to the principle that it is "informed by the presumption in favour of disclosure".

Paragraph 25 of the Decision Notice also states:

> "there is no further public interest in the disclosure of the withheld information"

I fundamentally disagree with this statement. When public bodies make spending decisions, there is absolutely a public interest in the motivations of those decisions and whether it is value for money. In keeping the substance of the legal advice withheld, the public in Harrow are kept completely in the dark.

Further, in paragraph 25 of the decision notice, Harrow Council is quoted as saying it:

> "remained, fully accountable and transparent with regard to matters pertaining to the ULEZ litigation."

This statement is clearly at odds with refusing to disclose legal advice. As already stated, there is no transparency or accountability when key information is withheld from the public.

No one forced Harrow Council, through its Deputy Leader, to make the disclosure, it was done through choice. It is utterly absurd that Harrow Council can state on record that they had a "reasonable chance of success" but then withhold the information that would allow the public to verify whether the statement is accurate. In short, a public body cannot say something publicly and then claim that information is actually confidential.

Paragraph 25 of the Decision Notice states:

> "There are no indications whatsoever that any of the councils acted in any way improperly or in breach of any laws or regulations in seeking to challenge the imposition of a London traffic scheme with which they disagreed, and therefore that the information requested would shed light on any wrongdoing."

While I make no allegation that any of the councils acted improperly, I do wish to verify the accuracy of the Deputy Leader's statement, and this can only be done through the disclosure of the information I requested. Trust in public bodies and figures is of paramount importance, so being able to verify this is clearly, very much in the public interest.

26. In response to the disclosure argument the Commissioner stands by the decision notice and says:-

> The Commissioner is of the view that the substance of legal advice is not revealed by one headline sentence. Instead, the substance of legal advice in this context refers to its substantive content. This would likely extend to, for example, the reasons for seeking any advice as well as which specific facts; law and arguments were taken into account and given weight by the legal adviser.
>
> The Commissioner notes an earlier First-tier Tribunal in the case of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* (EA/2007/0052, 15 February 2008) found that where"...25. ...None of the references reveal the full advice, or anything approaching that, or quote directly from it....."; then legal professional privilege could be maintained.

27. In relation to the public interest points made by the Appellant, the Commissioner argues that:-

> It is noted that the request was submitted on the same day as the High Court issued its 18-page judgment setting out the legal arguments and the Court's findings thereon. Clearly, at that time, it was not known whether any party would seek to challenge that decision. Further, the request sought all internal and external legal advice with associated email correspondence as well as all internal and external discussions regarding that legal advice. This is a substantial amount of material which, the Commissioner found, engaged regulation 12(5)(b) on the basis that its disclosure would adversely affect the course of justice.

28. The Council's response makes submissions about the issue of waiver of privilege. The Council does not dispute that that privilege is waived if the recipient of the legal advice discloses the substance of that advice. It submits that the question of the distinction between disclosure of the effect and the substance of the advice was considered by Vinelott J in *Derby and Co. Ltd and Others v Weldon v Others* (No. 10 ([1991] WLR 660, at

668B, and also cited more recently in *Re Yurov Thomas and others v Metro Bank plc and others* [2022] EWHC 2112 (Ch):-

> There are, of course, clearly contexts where a party who refers in interlocutory proceedings to the fact that he has obtained legal advice and who states the effect of that advice does not thereby waive privilege. In the common case of an application for summary judgment, the plaintiff will normally state that he has been advised that the defendant has no defence. He does not thereby waive privilege. In *Marubeni Corporation v. Alafouzos* (unreported), 6 November 1986; Court of Appeal (Civil Division) Transcript No. 996 of 1986 in which judgment was given on 6 November, Lawton and Lloyd L.JJ. drew a distinction between a reference to the effect of such advice and the substance or content of it…. In [that case and *Government Trading Corporation v Tate and Lyle Industries Ltd* (1984), unreported] [the Court of Appeal held that] what was material in the interlocutory proceedings was the fact that the plaintiff had been given advice to a particular effect and not the substance of the advice or the extent of the instructions given to the lawyer.

29. The Council submits that this can be applied in the present case. Saying that counsel has advised that there is 'no defence' discloses no more of the substance of the advice than saying that counsel has advised that there is a 'reasonable chance' of a claim succeeding; particularly when the context of the statement is to assert that a claim is 'not vexatious'. Neither discloses the reason for that advice or even (in this case) to what ground of the ULEZ judicial review the advice related.

30. The Council also advances submissions which would be applicable if the Tribunal were to find that privilege had, in fact, been waived. The Council argues that, in that situation, then material in the advice about issues other than the merits of the ULEZ judicial review should not in any event be disclosed as privilege would not have been waived in relation to those matters.

DISCUSSION

31. We note the comments that the Appellant has made about the failure of the Commissioner to seek his views on the Council's submissions and the public interest issue before completing the decision notice. It does seem to us that it would have been sensible for the Commissioner to have reverted to the Appellant before finalising the decision notice. Nevertheless the nature of the appeal to the Tribunal is that we are able to

consider all issues afresh and we now have the Appellant's up to date views and arguments which we will consider in this decision.

32. The first issue for us to consider is whether the exception in regulation 12(5(b) EIR is applicable in this case.

33. The main point raised by the Appellant is that as the Deputy Leader of the Council disclosed that the advice received was that there were reasonable grounds of success in the litigation, and therefore substance of the advice had now been disclosed. Privilege has thus been waived, he argues, and the exception in regulation 12(5)(b) EIR cannot apply.

34. We do not agree with this analysis. Having considered the passage from the *Derby & Co* case as set out above we note that the courts have drawn a 'distinction between a reference to the effect of such advice and the substance or content of it' and that there are circumstances where a party 'has obtained legal advice and…states the effect of that advice' but 'does not thereby waive privilege'.

35. We agree that this passage is applicable to the situation in this case. Simply because the Deputy Leader referred to the 'effect' of the advice, in order to respond to an allegation that the ULEZ litigation was vexatious does not mean that she can be said to have disclosed the 'substance or content' of the advice. The 'substance and content' will explain in detail the reasoning and conclusions culminating in the expressed view on prospects of success. It is indeed commonplace, in our view, for parties to claim that they have been advised that they have a 'good case' when involved in litigation. It is not the law that every time that happens then privilege in relation to the substance and content is waived, and that conclusion is supported by the case of *Derby & Co* and the cases cited therein.

36. In our view, the information sought by the Appellant is still covered by LPP and the exception in regulation 12(5)(b) EIR is engaged. Disclosing this information would have an adverse effect on the course of justice as it would breach the fundamental principle of LPP.

37. We must go on to consider the public interest test.

38. We agree with the Commissioner and the Council that the balance of the public interest favours maintaining the exception. We have set out the case law above which establishes

that there is an in-built weightiness, when considering the public interest, in favour of withholding the information to maintain LPP. This does not convert the exception in reg 12(5)(b) EIR into an absolute exception, but the Tribunal must look to see if there is anything in particular which would outweigh this public interest. We also note that we have to consider this case as at the date of the request. As referred to above, that date was the date the judgment in the judicial review case was handed down, and before it would have been known whether an appeal would have been pursued. This provides an additional reason why it is in the public interest not to disclose legal advice at a time when the litigation, potentially, had not come to an end.

39. The Appellant makes the strong point that disclosure is in the public interest as it will further the aims of transparency and accountability. In particular the Appellant cites the public interest in knowing the basis upon which the Council committed what are now known to be substantial public funds to a judicial review case that was unsuccessful. He also says that he wants to verify the accuracy of the Deputy Leader's statement.

40. However, we note that there is now a detailed High Court judgment which explores the arguments for and against the application for judicial review and so much of the information about the strengths of the case put forward by the Council, and what the court made of its arguments, is already available.

41. Thus, agreeing with the conclusion put forward in the decision notice, the Appellant has not put forward strong enough reasons why the public interest is such as to require LPP to be breached, and therefore the public interest is in favour on non-disclosure.

42. As this is a case invoking the EIR the Tribunal must also apply a presumption in favour of disclosure, as set out in reg 12(2) EIR. That is especially useful where competing arguments on the public interest are evenly, or nearly evenly, balanced. However, even considering this presumption, in our view the public interest in favour of withholding the information far outweighs the public interest in disclosure.

CONCLUSION

43. On the basis of the above, the Tribunal dismisses the appeal. Given our conclusions it is not necessary for us to consider the Council's additional arguments which are only relevant if we had found that privilege had been waived in relation to the substance of the advice.

Stephen Cragg KC

Judge of the First-tier Tribunal

Date: 13 September 2024