



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2009/0098

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50196391
Dated: 20 October 2009**

Appellant: Roger Woodford

Respondent: Information Commissioner

On the papers

Date of decision: 21st April 2010

Before

David Marks QC
Judge

and

Marion Saunders
David Wilkinson

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2009/0098

Subject matter: Legal professional privilege: Environmental Information Regulations 2004

Cases: Archer v Information Commissioner (EA/2006/0037)
Akzo Nobel v EC Commission (T123/03 and T253/03: 17.9.07)
AM&S v EC Commission (1982) ECR 1575
Calland v Information Commissioner and FSA (EA/2007/0136)
FSO v Information Commissioner (EA/2007/0092)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal of the Appellant and upholds the Information Commissioner's Decision Notice, Reference No. FS50196391.

REASONS FOR DECISION

Introduction

1. This appeal concerns an issue which has constituted one of the major themes of this Tribunal's decided case law since the introduction of the Freedom of Information Act 2000 (FOIA) and of the equivalent environmentally related legislation, namely legal professional privilege. The relevant provisions find expression in section 42 of FOIA as a qualified exemption to the general right of disclosure guaranteed by FOIA and in Regulation 12(5)(b) of the Environmental Information Regulations 2004 (the Regulation).

2. 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.”

3. 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; ...”

4. Regulation 14(3) provides that any refusal to disclose the information requested shall specify the reasons not to disclose the information requested including any exception relied on under Regulation 12(5).

5. In the present case the Appellant was involved in a protracted dispute with St Albans City and District Council concerning a right of way over certain council land near the Appellant’s property.

After the matter was referred to an Adjudicator, a court hearing was directed. Prior to the hearing, the Appellant was offered a limited right of way. In the words of the Decision Notice (para 2), the Appellant “accepted the offer having been assured by the council’s Estates’ Department that the offer was a genuine attempt to bring about an agreement and not related to advice given by Counsel instructed to conduct the case for the council”. The Appellant, subsequently, took the view that Counsel’s advice had been to the effect that the prospective hearing would be lost and that such assurance as had been given by the Council in all the circumstances was false.

6. The Appellant therefore requested that he be informed of the “nature and circumstances and full details of all and any legal advice given by your Department, and/or to your Department by Counsel, concerning my application to the Land Registry for the registration of a Right of Way, and the evidence then before Counsel, in the period immediately before and leading to the decision, after 2 years to make me an offer of a restricted Right of Way over the Council’s land beside my house”.
7. Although there is a preliminary consideration of whether and to what extent the information requested constituted, or constitutes, environmental information for the purposes of the Regulations, the real issue concerns whether the exception in Regulation 12(5)(b) is engaged and, in particular, what is the outcome of the test which the Regulations encapsulate as to whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
8. It is perhaps appropriate at this point to add that Regulation 12(3) states that in dealing with a request for environmental information,

a public authority “shall apply a presumption in favour of disclosure”.

The Request

9. The request which has been quoted in relevant part above is dated 4 August 2007. In it, the Appellant noted that it was “not open” to the public authority to refuse to disclose the information requested “on grounds of legal professional privilege, as the information could no longer be used in legal proceedings”. The letter also noted that according to a letter of 22 January 2007, “no written advice had been given by Counsel throughout, but no doubt you are well aware of appropriate records of whatever verbal advice was given ...”.
10. In its reply, the public authority sought to rely on section 42 of FOIA. The response went on to consider the relevant public interests in play. The local authority mentioned the fact that although proceedings before the Adjudicator had concluded, that did not detract from the public authority’s assessment that the public interest involved favoured maintenance of the exception. There then followed a review of the public authority’s determination. Prior to the issuance of the outcome of that review, the public authority’s Chief Executive, by letter dated 1 November 2007, set out his own findings. The letter deals with matters which arose after the compromise with the Appellant had been reached in the form as it was put of the granting on 1 September 2006 of an “easement” allowing the Appellant to pass “with or without vehicles over a specified plot of land”.
11. The Appellant reiterated the gist of his complaint in a subsequent letter of 22 November 2007. The Tribunal feels it is important to

set out some of the terms of the Appellant's position as expressed in that letter in terms, namely:

“On 14th July, 2006, after all the work of preparing witness statements, statements of case, research into previous relevant court judgements and final preparation for the scheduled hearing, the Council offered to grant a right of way as I had suggested 2 years earlier, on the basis of a use limited to 20 times a year. Miss Debbi White of the Council's Estates' Department came to see me on 24th July, 2006, to discuss the physical details of the proposal. At that meeting Miss White assured me that the offer, although belated, was not related in any way to advice given by counsel instructed to conduct the case for the Council. It was, she said a genuine attempt to bring about agreement, apparently following the review of files by a Miss S, [*sic*] Fisher, a new young solicitor, temporarily employed by the Council. Given that assurance, I agreed to accept the offer of my original proposal and to withdraw my application before the Adjudicator.

It has subsequently become clear that legal advice was given by counsel and that legal advice was given to the Estates Department. I now understand that in the light of normal legal practice, it is extremely unlikely that the temporarily employed junior solicitor who sent the offer, would have done so without reference to the barrister in charge in charge [*sic*] of the Council's case and senior legal officers. In consequence, and bearing in mind the 2 year history of non-cooperation by the Council's officers, there are grounds for the suspicion that, whether she knew it or not, Miss White's assurance was false, such that I was deceived into withdrawing my application and that my agreement to accept a restricted Right of Way, and to pay for it was obtained by deceit [*sic*].

That advice from counsel was received by the Council's Legal Department, and that legal advice was given to the Estates Department, is established by the Council's letter of 4th September, 2007, (Document 2). This is a clear indication that the belated offer of the compromise solution to the dispute which I had myself suggested 2 years previously, was not sent out by Miss Fisher without the benefit of Counsel's advice. The logical conclusion is that, having reviewed the witness statements and legal submissions, Counsel concluded that the Council's case was likely to be lost, so that the best advice he could give was that a compromise offer should be made, whereby their concerns for safeguarding public land could be met."

12. Although considerations of appeals under the Regulations, as well as under FOIA, are often described as being motive-blind in the sense that under both regimes no regard should be had to the reasons as to why a request may have been made such that it may be said to promote a particular interest or set of interests, or motive held or promoted by the party making the request, the Tribunal finds these passages difficult to follow.
13. It is impossible to see how the two year period of non-cooperation, whether or not coupled with the solicitor's deference to Counsel, justifies an allegation of falsehood quite apart from the absence of any explanation of precisely what form the alleged falsehood took. On any basis, any allegation of dishonesty needs to be made very clear and to be based on the clearest evidence. No such evidence is apparent in the terms of the passages quoted above, or indeed anywhere else in the exchanges sent by the Appellant. The Appellant knew that the eventual offer he received, and accepted, revisited the compromise solution he himself had previously put forward. Furthermore, even assuming that the revisiting of the said offer in some way necessarily suggested that

the local authority, having been advised by Counsel, knew or appreciated that it would lose, the Tribunal remains at a loss to see how that fact of itself constitutes an action or representation that was in some way “false”.

14. Moreover, it is difficult to see, leaving aside the Appellant’s legal costs, what real disadvantage or loss the Appellant could be said to have incurred given that on his own admission, he was offered a solution that he himself had sought sometime previously. In particular, the Tribunal notes that later in the same letter, the Appellant revisits the allegation of falsehood, by stating that it cannot “be in the public interest that the reasonable suspicion of decept [*sic*] by the Council’s office be left standing”.
15. The earlier letter of 1 November 2007 made it clear that a separate sum with regard to costs was later tendered to the Appellant. This latter issue is not one which can be said to have any bearing on the issues in the appeal. This is because it post-dates the time which relates to the subject matter of the request. As indicated earlier, the only justification the Appellant put forward was the fact that legal professional privilege could no longer be claimed in the light of the settlement reached.

Exchanges with the Commissioner

16. In subsequent exchanges with the Commissioner, the local authority maintained (see, in particular, its letter of 15 August 2009 at page 3) that the information which was sought comprised the documents “created to provide information to enable the solicitors in the Legal Department, or Counsel, to give legal advice in their professional capacity, to the Estates Department” and that the documents contained “the provision of that legal advice”. One particular document was, and comprised, “one Officer’s witness

statement” which was the subject of a claim for so-called litigation privilege, having been prepared for the adjudication hearing.

17. As for the competing public interests, in the Council’s view “the legal advice if released would damage the Council’s ability to deal with any future applications for rights of way over amenity land”, such being the nature of the land adjacent to the Appellant’s own land. Disclosure would, it was claimed, put the Council at a disadvantage in their future discussions with regard to legal actions in relation to such subject matter.

The Notice of Appeal and the Reply

18. The Notice of Appeal is accompanied by a number of grounds which were set out in a letter from the Appellant dated 12 November 2009. Two principal arguments are advanced. First, it is claimed that the information requested is not subject to legal professional privilege, and second that the competing public interests militate in favour of disclosure.
19. With regard to the first ground, the Appellant appears to stress and rely upon the critical role, and in particular, the evidentiary importance which the requested information fulfilled in relation to the dispute. The Appellant emphasised the fact that there was no need for legal professional privilege given that proceedings were at an end, a point made earlier. Next, he contended that the public authority would suffer no “material disadvantage” if the requested information were disclosed. Also, the Appellant returned to the allegation of “wrong doing”, again a point referred to earlier. Finally, the Appellant sought to contend that legal professional privilege did not extend, and does not extend, to in-house lawyers.

20. The Commissioner's Reply dealt with the above points as follows. First, insofar as the disputed information had any evidentiary importance, this was said to constitute a private, as distinct from a public, interest and therefore by definition did not contribute to the balancing of the competing public interests. Second, the fact that specific litigation was at an end was by no means conclusive. The contents of any advice provided could well have a generalised importance that went beyond the four corners of any particular dispute. The third argument as to the claimed absence of any material disadvantage was, to some extent, answered by the previous point. The revelation of the Council's thinking on this case could have repercussions on future and similar cases.
21. As for suggested wrong doing put in terms of a falsehood as referred to in the earlier paragraphs in this judgment, there was simply no evidence, let alone compelling evidence of any such occurrence in the present case. Finally, decided case law including a decision of this Tribunal, pointed clearly to the applicability of legal professional privilege to both external legal advisers, as well as to advice generated in-house.

A further response by the Appellant

22. In a letter dated 7 December 2009 sent to the Tribunal, the Appellant revisited some of the arguments set out in the previous section. Out of respect to the Appellant's position, and given the fact that he represents himself, the Tribunal feels that in the circumstances it is perhaps appropriate briefly to refer to this further exchange.
23. The letter begins by suggesting in paragraph 2 that the Commissioner's account of the background to the appeal "albeit unintentionally and in the interests of brevity, imparts a gloss to

the history of the Council's actions" which is likely to prejudice the Tribunal's approach. However, the Appellant goes on to state unequivocally in paragraph 5 of his letter that the offer he finally received from the Council, "gave me all I really wanted". His only interest therefore "now" was "to establish whether or not the Council's officers acted in good faith" which he describes as "a matter of considerable public importance" (see generally paragraph 6).

24. At paragraph 9, he stresses the importance that public officials have to act with "scrupulous honesty". Consequently, he ends by stating that if it can be shown the council's officers did "tell me the truth, I shall be well satisfied". He adds that there "are no unsubstantiated allegations" of deceit contrary to what might have been inferred or stated in his previous exchanges, and that there "are no unsubstantiated allegations" as the Commissioner otherwise suggested. He stated that he was prepared to accept, therefore, that it "remains probable" that there was no deception. However, on reading the letter in its entirety, the Tribunal is not entirely satisfied that there is an unequivocal concession that no fraud is alleged. It appears to the Tribunal that at the very least the Appellant invites the Tribunal to allow his appeal in order that he can be satisfied that no deceit as alleged or at all has occurred.
25. The Tribunal takes the view that it is entirely inappropriate for an appeal to be motivated by this type of approach based as it appears to be on completely unfounded allegations of dishonesty. At the very least the Tribunal views the Appellant's approach as misguided. As pointed out above at paragraph 13, no such allegation should be made, let alone persisted in, as they are here, on the basis of speculation. Were this allegation the sole basis for the appeal the Tribunal would have been minded to consider characterising its views by making a suitable order for

costs. As things are, there remain other justifications for dismissal of this appeal.

The relevant principles

26. Before turning to the issue of legal privilege, the Tribunal is firmly of the view that the information sought constituted environmental information. As for legal professional privilege, the relevant principles are well known and need only be restated in brief. As has been pointed out by the Commissioner in written submissions, legal professional privilege safeguards confidentiality between professional legal advisers and clients to ensure that proper openness can be in place in relation to the preparation and provision of legal advice. See, e.g. this Tribunal's decision in *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037), especially at paragraph 62.
27. There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice as stated and referred to on the face of the Regulations. The Tribunal has seen the disputed information and is entirely satisfied that save for one document, which is a witness statement created for the purpose of litigation, (and thus is subject to what is called litigation privilege, a specific form of legal professional privilege) the disputed information which is otherwise not disclosed consists of exchanges generated for the purposes of obtaining legal advice, and therefore subject to legal professional privilege.
28. As indicated above, in his Grounds of Appeal, the Appellant has contended that legal professional privilege does not extend to communications by in-house lawyers. Reliance is placed by the Appellant on a decision which is properly described as *Akzo*

Nobel Chemicals and Acros Chemicals Ltd v Commission of the European Communities (CFI:T-125/03 and T-253/03 17 September 2007), as well as a decision known as *AM&S (Europe) Ltd v Commission of the European Communities* (1982) ECR 1575.

29. The Tribunal is entirely satisfied, as contended for by the Commissioner, that these two cases do not provide any authority which might otherwise seek to limit the general scope of legal professional privilege in the way suggested. This Tribunal, itself, has considered the issue in *Calland v Information Commissioner and FSA* (EA/2007/0136), especially at paragraphs 34 and 35. Put shortly, the Tribunal found, and this Tribunal respectfully concurs, that the same requirements of confidentiality and candour apply, whether or not there is advice provided by an employed lawyer or from an independent legal professional.

30. In all the circumstances, the present Tribunal is entirely convinced by the submissions made on behalf of the Commissioner, which in turn reflect those of the Council, that disclosure in this case would provide a very clear indication of the relevant arguments, as well as any strengths or weaknesses, which the Council might have in any particular case with regard to rights of way over public amenity land, placing it potential or in fact in a position of disadvantage in any future litigation or dispute. See generally the Decision Notice at paragraph 38.

The public interest balance

31. The Tribunal entirely accepts that a public authority is only entitled to refuse to disclose environmental information where the public interest in maintaining the exception relied on outweighs the public interest in disclosure.

32. As mentioned on more than one occasion above, the Appellant has contended that there is no longer any need for legal professional privilege in this case since court proceedings are now no longer contemplated. The Tribunal however accepts the Commissioner's contention that, as reflected in the previous paragraph, future disputes might be at risk were the information sought now to be disclosed. The Tribunal therefore endorses the Commissioner's findings on this point.
33. So far as the suggested wrong doing is concerned, quite apart from the absence of any such evidence in this case, the Tribunal would otherwise accept that were there in fact some element of wrong doing, the same might be relevant to the public interest of disclosure. However, as is also pointed out above, evidence of such wrong doing must at least be cogent. See generally *Foreign & Commonwealth Office v Information Commissioner* (EA/2007/0092), especially at paragraph 29. In this case, there was simply no evidence, let alone any cogent evidence, which has been put forward by the Appellant with regard to this contention.
34. Finally, the Tribunal repeats the facts and matters referred to above to the effect that this case is not concerned in any way with the Appellant's own private interests. Subject to what is said above at paragraphs 24 and 25, the Tribunal is prepared to accept that the Appellant to some extent has recognised this. If it is claimed, as it seems to be, that the disputed information had some form of "vital evidentiary role" in the Appellant's dispute, the same is simply not relevant in addressing the equation to be resolved with regard to the competing public interest.
35. For all the above reasons, the Tribunal respectfully adopts the contentions put forward by the Commissioner and upholds the Decision Notice in this case.

Signed:

David Marks QC
Tribunal Judge

Date: 21 April 2010