



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

EA/2011/0147

B E T W E E N:-

WILLIAM JONES

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

DECISION

Introduction

1. This decision relates to an appeal by the appellant against the Commissioners Decision Notice dated 22 June 2011. The Tribunal allows the Commissioners application for the Appellant's appeal to be struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009. Accordingly, the appeal is dismissed.

Relevant Statutory Framework

2. The relevant statutory framework is set out in paragraphs 4-9 of the Response by the Information Commissioner, dated 10 August 2011 and is not repeated here.

Factual Background to this Appeal

3. The background to this appeal is set out in paragraphs 3-7 of the decision notice and is not repeated here.

Request by Complainant

4. By email dated 12 March 2010 the Appellant wrote to the Department of the Environment (Northern Ireland) ('the Department') making the following request:
"I now wish to have a copy of the recorded questions put to the lawyers as per PSE: 0406" ('the request').

5. The requested information was correspondence between the Department and the Departmental Solicitors Office ('the DSO') requesting legal advice ('the withheld information').
6. By letter dated 20 April 2010 the Department confirmed that it held information relevant to this request but refused to disclose it, relying on regulation 12(4)(e) of the Environmental Information Regulations 2004 ("EIR"). This decision was upheld following an internal review.
7. The appellant complained to the Commissioner on 7 July 2010 challenging the decision to withhold the information requested.
8. The chronology of the Commissioner's investigation of this case is set out in paragraphs 15-17 of the Commissioner's Decision Notice.

The Commissioner's Decision

9. The Commissioner served a Decision Notice dated 22 June 2011 in relation to this matter in accordance with s. 50 of the Act. The Commissioner found that the exception was correctly applied.

The Notice of Appeal

10. The Tribunal finds that the Appellant does not dispute the Commissioner's conclusion that the information requested amounted to environmental information and that therefore the EIR applied.
11. The Tribunal also finds that the Appellant does not dispute that the exception at regulation 12(4)(e) EIR is engaged.
12. The issue for the Tribunal therefore is whether the Commissioner erred in concluding that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The public interest test

13. The public interest test is set out at regulation 12(1) of the EIR. This states that a public authority can only rely on an exception contained within regulation 12(4) or 12(5) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. In addition, regulation 12(2) requires that the public authority apply an explicit presumption in favour of disclosure.

Public interest factors in favouring disclosure of the information

14. The appellant argued that there were overwhelming arguments in favour of disclosing the information. The appellant argued that the Department obtained the legal advice in an effort to reassure the appellant and others that proper process had been followed with regard to the planning issue.

15. The complainant argued that the public was entitled to be informed exactly what advice was sought from the DSO, so that they may be assured that the Department presented all the relevant facts to the DSO. Without disclosure of the request for legal advice, the appellant argued that the public could not be satisfied that the Department had followed through on its commitment to consider whether planning permission could be discontinued.
16. The appellant also argued that as the Department had advised him that the decision to grant planning permission was “soundly based”, the Department had partially disclosed the legal advice. On this basis, the appellant argued that Legal Professional Privilege (“LPP”) had been “waived” and the information ought to be disclosed in full.

Public interest factors favouring maintaining the exception

17. The Department argued that there is a strong public interest in protecting the ability of public authorities to consult advisers in confidence, to be able to share information fully and frankly and to seek and obtain advice with the knowledge that such advice is protected from disclosure. The Commissioner considered that this argument is relevant under regulation 12(4)(e) to the extent that the quality of the Department’s internal debate and decision making processes would be damaged if public authorities were deterred, by the prospect of disclosure, from seeking legal advice. The Commissioner found that there is a strong public interest in public authorities being able to debate different views and advice given. Further, the Commissioner found that where disclosure of information would have an adverse impact on this ability, there is more likely to be a strong public interest in maintaining the exception.
18. The Department also argued that the legal advice in question was relatively recent, and not limited in relevance to the particular case. The Department explained that the legislation under which it operated had not changed since the legal advice was sought, and therefore the issues discussed may well prove relevant in other situations. Therefore the Department was of the view that disclosing the withheld information in this case could prejudice the Department’s position in future cases, for example, applications for judicial review in relation to planning decisions. The Commissioner accepted that any chilling effect upon a public authority’s willingness to seek legal advice would be likely to be more pronounced if the advice, or request for advice, disclosed were live. The Commissioner also accepted that the Department’s ability to use its internal processes to fully evaluate all available options would be limited by external knowledge of its current concerns as to the legality of any course of action or relevant matter.

The balance of the public interest

19. The Tribunal finds that the Commissioner carefully considered the arguments presented in favour of maintaining the exceptions against the arguments favouring disclosure. The Tribunal finds that the Commissioner did take into

account the presumption of disclosure as set down by regulation 12(2). The Tribunal now deals with each main argument in turn.

20. First, the appellant argued that the Department could not claim reliance on LPP because it had advised him that the planning decision was “soundly based”. The Commissioner was not persuaded that the confidentiality of the information had been lost, as the Department’s comment that the planning decision was “soundly based” was not sufficiently detailed to result in a loss of confidentiality. The Tribunal agrees with the Commissioner’s conclusion in relation to this argument.
21. Second, the Commissioner considered whether LPP is undermined by any overriding public interest. The Commissioner was assisted in this regard by the decision of the *Foreign and Commonwealth Office v Information Commissioner* EA/2007/0092 in which the Tribunal commented at paragraphs 29 and 33:

“...what sort of public interest is likely to undermine [this] privilege?...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious case would be those where there is reason to believe that the public authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained...”
22. In the context of this case, all parties agree that errors and failings have occurred in relation to the planning issue. Indeed the Department agreed to consider whether planning permission should be discontinued and advised the appellant that it would seek legal advice on this issue.
23. However, the Commissioner found no evidence to suggest to any extent that the Department failed to pursue this assurance. The Department did seek legal advice as it said it would, and having inspected the request for legal advice, the Commissioner was satisfied that the Department did not misrepresent the facts or omit relevant information. In addition, the Commissioner found no evidence to suggest that the Department subsequently misrepresented the advice it received, pursued a policy that appeared illegal, or ignored unequivocal advice.
24. On that basis, the Commissioner did not afford the public interest in disclosure the substantial weight that he would have given it had there been cogent evidence of misrepresentation. The Tribunal finds that the Commissioner was correct in his approach and in his conclusion that LPP was not undermined by any competing / contrary public interest in disclosure.
25. Third, the Commissioner accepted the Department’s argument about the advice being relevant to other cases. Further, the Commissioner found that the fact that the advice remained live as at the date of the request added considerable weight to the public interest in maintaining the exception. The Tribunal finds that the Commissioner’s approach in this context was correct, and it too finds that the fact that the advice remained live as at the date of the request adds considerable weight to the public interest in maintaining the exception. Indeed the Tribunal

shares the Commissioners view that it is important to ensure that public authorities be able to obtain free and frank legal advice to support them in the effective and appropriate exercise of their functions.

26. Fourth, with regard to the fact that there are a number of local objectors to the planning development, the Commissioner considered that the planning decision in this instance in effect impacts on a relatively small number of people. In line with the Tribunal's decision in *Gillingham v the Information Commissioner and the Crown Prosecution Service* EA/2007/0028, which concerned a decision about a public footpath, the Commissioner did not consider the number of people affected in this case to be a significant factor in favour of disclosure. This Tribunal agrees with the Commissioners conclusion on this issue also.
27. In summary the Tribunal is entirely in agreement with the conclusions reached by the Commissioner in all of the four above-mentioned main issues. Furthermore, the Tribunal finds that the Commissioners conclusion that, in the circumstances of this case, the balance of the public interest in maintaining the exception outweighs the public interest in disclosing the information was the correct conclusion.
28. The Tribunal finds that the Commissioner performed the balancing exercise between the public interest in maintaining the exception as against the public interest in disclosing the information fairly and reasonably. Moreover, the Tribunal shares the view, expressed by the Commissioner, that it is of fundamental importance that a public authority should be able to seek and discuss legal advice in confidence when making decisions.
29. For the above reasons the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it succeeding. For that reason, the appeal is dismissed.

The Grounds of Appeal

30. The appellant appears to raise some additional matters in his grounds of appeal. The Commissioner has responded to these in his Response in paragraphs 23-33. For the reasons set out therein, the Tribunal is in agreement with the Commissioner. However, for the sake of completeness, the Tribunal shall consider them briefly below.
31. First, in relation to the Appellant's allegation that the Department acted illegally, it is not within the Tribunal's jurisdiction to decide upon the legality of the actions of the planning department.
32. Second, insofar as the appellant seeks disclosure of the legal advice itself received back by the Department from the DSO, this does not form part of the withheld information in this case. The Tribunal emphasises that the withheld information in this case, that forms the subject matter of the information request, is the questions that were put by the Department to the DSO.

33. Third, paragraphs 2 and 3 of the appellant's grounds of appeal relate to the appellant's underlying dispute with the planning department. They do not relate to the question of whether the Commissioner was correct in his decision notice in concluding that the Department was correct to withhold the requested information. It is not within the Commissioner's jurisdiction to consider whether the Department acted unreasonably during the planning process. Nor is it within the Tribunal's jurisdiction to decide whether the Department acted unreasonably in relation to its planning decisions.

Conclusion

34. In light of the above, the Tribunal allows the Commissioners application for the Appellant's appeal to be struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009. Accordingly, this appeal is dismissed.

Brian Kennedy QC
20th December 2011.