IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0075
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50326544
Dated: 21 February 2011

Appellant: HG Copeman
Respondent: Information Commissioner

Heard at: Victory House, London

Date of consideration: 11 August 2011

Date of decision: 26 August 2011

Before

Christopher Hughes OBE
Judge
and
Suzanne Cosgrave
Ivan Wilson

Attendances: This hearing was conducted on the papers.

Subject matter: Freedom of Information Act 2000
Section 42: legal professional privilege

Cases considered:
Bellamy v the information Commissioner and the Department of Trade and Industry EA/2005/0023

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal for the reasons stated.

Signed:

Christopher Hughes
Judge

Dated this 26th day of August 2011

REASONS FOR DECISION

Background facts

1. Mr HG Copeman (the Appellant) lives near to Battersea Park. He has been concerned for some years about the holding of events, in particular private events, in the Park and has challenged the legality of this on a number of occasions.

2. On 20 February 2010 the Appellant wrote to the London Borough of Wandsworth (the Council) , the public authority responsible for Battersea Park, asking that they send him a copy of "the Counsel's Opinion" which, from the context of previously dealings with the Appellant, the Council correctly interpreted as a copy of the legal opinion the Council had obtained concerning the legal framework controlling the holding of events in the Park.

3. The Council replied with their refusal notice on 16 March 2010 indicating that they relied on S42 of the Freedom of Information Act 2000 (FOIA) to assert that the requested information was exempt from disclosure by reason of legal professional privilege. The Appellant requested a review on 18 June 2010 and the Council replied on 21 July 2010 maintaining their previous decision.

4. On 16 July 2010 the Appellant complained to the Information Commissioner (the Respondent in these proceedings) concerning the decision of the Council to withhold the requested information. The Respondent conducted an investigation, obtained the requested information, received arguments from both parties and, having expressed a preliminary view on 23 September 2010, issued a Decision Notice on 21 February 2011 upholding the position of the Council by finding that legal professional privilege applied to this information and having considered all relevant matters the public interest was served by not disclosing it.

The Appeal

5. In his appeal the Appellant simply set out his position that the Respondent had erred in finding that the public interest lay in maintaining the exemption. His detailed position is contained in the argument advanced by the Appellant in his reply to the Respondent's Response :-

   "The background is whether or not private events are lawful in public parks. I do not expect a ruling on this issue. Two separate legal opinions were obtained-the first (from the GLA) explained that no one knew for sure since the High Court has not ruled on the matter. The second (from Wandsworth Council) expressed no such doubts, apparently stating that private events are lawful and gave no reason for such certainty.

   As it seems odd that the two expert opinions should differ so, I can only assume that Wandsworth Council may have misread the certainty in their opinion. While the GLA opinion is open to anyone to read, the Wandsworth opinion is unavailable for public scrutiny. As the issue concerns the public and the use of public parks, it seems very unfair that no one is allowed to vet the Council's opinion."

6. In order to understand this position fully it is helpful to set out in full what he describes as the GLA advice. It is contained in a memorandum dated 23rd September 2003 from a senior legal adviser in the GLA legal department to a Member of the Assembly:-

   "Thank you for your memorandum of 19th September, which I received today.

   The use of part of parks and open spaces for purely private functions is a somewhat contentious issue and one in respect of which there is limited guidance for local authorities. I have to say that this is a particularly grey area of the law for which we in legal are unable to offer a definitive interpretation of the statutory provisions. While we could venture an opinion, it would be simply that and possibly no more validity than any other opinion.

The obvious course would be for the matter to be tested by way of judicial review, but I do understand Mr Copeland's (sic) reluctance to incur the potentially considerable personal liability which could result from such an action.

There are a number of legal firms who provide advice free of charge (pro bono) and I suggest that the Appellant seeks assistance from one of those firms. The Law Society is able to provide details of firms supplying a pro bono service.

I am sorry not to be able to be more helpful and I return Mr Copeland's letter herewith."

Consideration of the Appeal

7. It is immediately apparent that the Appellant has failed to understand the document which he has seen. The memorandum of 23 September 2003 is not legal advice. The author states categorically "while we could venture an opinion" he does not do so and then states that if a definitive interpretation is wanted then that may come from the Court by way of Judicial Review and if legal advice is wanted the Appellant might consider seeking pro bono advice. He concludes "I'm sorry not to be able to be more helpful."

8. The Appellant has not seen legal advice but on the basis of comments in a memorandum which is not legal advice that he has seen he has chosen to make an inference as to the nature and quality of the advice that the Council has but have not disclosed. He has no provided anything which could be said to be evidence upon which to draw in order to make such an inference.

9. The Respondent correctly points out that at the heart of the Appellant's case is a challenge to the propriety of the conduct of the London Borough of Wandsworth with respect to the management of Battersea Park. That is not a matter with which this Tribunal can concern itself. On the basis (explored above) of a misinterpretation of a memorandum that he has seen the Appellant has drawn inferences which challenge the propriety of the conduct of the London Borough of Wandsworth and the quality of the legal advice at it has received. It is sufficient for the purposes of this Tribunal to indicate that it has seen the disputed information and the document containing the requested information has the

necessary characteristics of legal advice and purports to be legal advice-unlike the memorandum upon which the Appellant relies.

10. In deciding whether information such as this should be disclosed the Tribunal has to perform a two stage test. The first is determining whether a claim of legal professional privilege could attach to the requested information.

"**42. Legal professional privilege**

(1) **Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information**."

11. The Tribunal has helpfully explored the nature of legal professional privilege in the case of *Bellamy v the information Commissioner and the Department of Trade and Industry{EA/2005/0023}*:-

"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 referred to legal advice which might be imparted to the client, and even exchanges between the client and (third) parties if such communication would exchanges come into being for the purpose of preparing the litigation"

12. Legal advice privilege is privilege where no litigation is in process or being contemplated. In order for the legal advice privilege to apply communications must be confidential and made between a client and legal adviser acting in a professional capacity for the sole or dominant purpose of obtaining legal advice. Communications made between an advisor and client in the relevant legal context attract privilege. The information requested was subject to this legal advice privilege.

13. The Tribunal have considered the advice and find that conclusion of the Respondent is unarguably correct. Furthermore the Council has indicated that in the event of litigation relating to the lawfulness of events held in the Park the Council would rely on the advice. The requested information therefore falls within section 42 of FOIA and is exempt information.

14. The second stage of the test which the tribunal has to perform is to consider the impact of section 2 (2) (b) and whether:-

"**in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."**

15. In order to carry out this balancing exercise the Tribunal has to consider all the relevant factors. The first matter to take into account is the significance of legal professional privilege for the Rule of Law and its key role in ensuring the rights of individuals and enabling them to be properly advised and represented. The maintenance of public confidence in the right to obtain advice under conditions of legal professional privilege is of fundamental importance in securing the rights of all in society and in maintaining trust in the legal profession and its key role in ensuring access to justice without fear or favour. In considering a case such as this care must therefore be taken to ensure that any decision of this Tribunal does not undermine that public trust and confidence in ethical relations between the legal profession, their clients and the courts.

16. The Appellant in his arguments has put forward no argument of substance as to why legal professional privilege should not attach to the advice received by the Council except (as explored above) a fallacious argument based on the memorandum that he has seen from another public body. Furthermore it is clear that this legal advice is still relevant to the decision-making of the Council, continues to be relied on, and would be relied on in the event of further litigation. While openness and transparency by public authorities is a general public interest and it is clearly in the public interest for the Council to conduct itself properly, there is no widespread public interest or concern to suggest that the public at large has an active concern in this issue; nor indeed is there any indication that the Council, having obtained legal advice, has not considered it appropriately and applied it effectively.

17. In *Bellamy v the Information Commissioner and the DTI [EA/2005/2330]* The Tribunal stated that:

"..There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest."

18. In the circumstances the Appellant has adduced no arguments of substance to stand against the very important principle of legal professional privilege and the Tribunal finds that the Respondent in this case has, in his Decision Notice, made a decision in accordance with the law.

Judge Christopher Hughes OBE

26th August 2011