



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2014/0272

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice dated 25 September 2014
FS50544912**

Appellant: Peter Fenning
First Respondent: Information Commissioner
Second Respondent: Christchurch Borough Council

Considered on the papers

Promulgation Date: 27th April 2015

Before
John Angel
(Judge)
and
Rosalind Tatam and Pieter de Waal

Subject matter: legal professional privilege under FOIA (s.42) and EIR (regulation 12(5)(b))

Cases: *Department for Communities and Local Government v Information Commissioner & WR* ([2012] UKUT
Crawford v Information Commissioner & Lincolnshire County Council
EA/2011/0145

DECISION

The Tribunal upholds the decision notice dated 25 November 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Christchurch Borough Council (“the Council”) established an investigation into the Cornfactor Development Planning issues by the Council’s Audit and Scrutiny Committee to be held on 18 March 2014. This meeting was postponed by the Council because of an application for judicial review of matters relating the investigation.
2. One of the four terms of reference of that investigation was “The substantive legal position concerning the felling of trees in connection with the Cornfactor Development.”
3. The postponed Audit and Scrutiny committee meeting was held in public, on 21 October 2014 by the renamed “Scrutiny and Policy Review Committee”. The report in relation to the planning issues (“the Report”) refers to the fact that legal advice had been obtained.

The Request

4. On 23 March 2014 Mr Fenning emailed the Council requesting:

“... a copy of the Counsel’s legal opinion, as referenced on page 9, section 4.6 of the document entitled ‘Investigation into the Cornfactor Development Planning Issues’. I make this request under [FOIA].”
5. On 25 March 2014 the Council responded and said it was withholding the information. The Council explained that the information was subject to legal professional privilege and that the information was exempt pursuant to the provisions of section 42 FOIA. The Council did not refer to the application of any of a public interest test¹.

¹ Section 42 FOIA is a qualified exemption which means that even if information falls within the exemption, the information will only be exempt if, in all the circumstances of the case, the

6. There followed further correspondence between Mr Fenning and the Council. On 10 April 2014 he asked the Council four further questions concerning the legal advice which the Council had obtained. On 25 April 2014 the Council responded, answering Mr Fenning's further questions. The Council also asked Mr Fenning whether he wished to request an internal review of the Council's decision to withhold the information requested on 23 March 2014.
7. On 13 May 2014 Mr Fenning asked the Council to review its decision. On 21 May 2014 the Council responded, advising that it had reviewed its previous decision and that it was satisfied that "the qualified exemption of legal privilege has been properly applied to the request and the Council has weighed correctly the public interest test in determining not to disclose the information being sought". However, no details of the public interest test were given.

The Complaint

8. Mr Fenning complained to the Commissioner. Following his investigation the Commissioner issued a Decision Notice dated 25 September 2014 ("DN") which concluded:
 - a) Having reviewed the information requested, the information constituted environmental information under regulation 2 Environmental Information Regulations 2004 ("EIR"). Accordingly, access to the information ought to be considered under the EIR regime rather than FOIA;
 - b) The information was subject to the exception at regulation 12(5)(b) EIR; and
 - c) In all the circumstances, the public interest in maintaining the exception outweighed the public interest in disclosing the information.

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The Appeal

9. Mr Fenning makes a number of complaints, namely:
 - a. The Council rejected his request by using an incorrect regulation;
 - b. The Commissioner should not have put forward his view on regulation 12(5)(b) EIR;
 - c. He considers that the requested information has been seen by Borough Councillors and that this means the information has been seen by third parties and so legal professional privilege does not apply.

Legislative Framework

10. The EIR implement EC Directive 2003/4/EC. Regulation 5 EIR imposes a general obligation on a public authority which holds environmental information to make that information available on request (subject to various other specified provisions of the EIR). “Environmental information” is defined in regulation 2(1) of the EIR to include “*any information in written, visual, aural, electronic or any other material form*” on “*(a) the state of the elements of the environment, such as air, atmosphere, water, soil, land, landscape and natural sites...*”.
11. If information falls within the definition of ‘environmental information’, it is exempt information under section 39 FOIA and falls to be considered under the EIR.
12. Regulation 12 EIR contains a number of exceptions to the general duty to provide information on request.
13. Regulation 12(5) states:

“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”.

14. A public authority may refuse to disclose information which falls within one of the exceptions under regulation 12 if, but only if, the public interest in maintaining the exception outweighs the public interest in disclosure in all the circumstances of the case². The public authority must apply a presumption in favour of disclosure³.

Grounds of appeal

15. We deal with each ground of appeal in turn.

Complaint 1: The Council rejected Mr Fenning's request by using an incorrect regulation

16. The Council rejected Mr Fenning's request for information by relying on section 42 FOIA. In his DN the Commissioner decided that the Council was unable to rely on section 42 FOIA because the information requested was 'environmental information' and so access to the information should be considered under the EIR rather than FOIA.

17. We have considered the information in question and can see that it relates to planning applications concerning the development of the Cornfactor site (including issues regarding trees on the site and on adjacent land). We agree with the Commissioner that a legal opinion in relation to such matters comes within the definition of environmental information. Mr Fenning does not challenge the Commissioner's position.

18. What Mr Fenning argues is that because the Council considered the information under the incorrect regime (i.e. FOIA rather than EIR) the information ought to be disclosed. While Mr Fenning may consider this procedural point flaws all of the Council's decision-making on this point, this cannot mean that information which may be withheld under EIR has to be disclosed simply because the public authority did not identify it as environmental information and consider the EIR.

² See regulation 12(1)(a) EIR

³ See regulation 12(2) EIR.

19. Where a public authority wrongly identifies the type of information (environmental or other) this does not prevent, in our view, the Commissioner or Tribunal considering the matter under the correct legislation. Also where there is a similar or equivalent exemption claimed then the Commissioner or Tribunal can, in effect, transfer the exemption over so that it can be considered under the correct statutory regime. This has been the practice of the Tribunal for sometime. Although we are not bound by decisions of other Tribunals we consider this is the approach that Parliament intends for us to take.

Complaint 2: Consideration of regulation 12(5)(b) EIR

20. Mr Fenning suggests that the Commissioner should not have put forward his view on regulation 12(5)(b) EIR.

21. Having found that the information was environmental information within the definition of regulation 2 EIR the Commissioner was bound to consider the complaint under the EIR. The Council had claimed that the information was exempt because it was subject to legal professional privilege (“LPP”). In our view the Commissioner was bound, therefore, to consider whether the ‘equivalent’ provision in the EIR applied to the requested information.

22. In *Department for Communities and Local Government v Information Commissioner & WR* ([2012] UKUT 103 (DCLG)), the Upper Tribunal noted that there is no express exemption under the EIR in respect of information for which the public authority could claim LPP (§47). It went on to say at §54, however,:

“It is in our judgment clear that the factors which can be taken into account in determining whether the course of justice would be adversely affected by disclosure include adverse effects on the course of justice in the particular case, such as that it would be unfair to give the requester access to the public authority’s legal advice, without the public authority having the corresponding benefit ... However, it would of course have to be borne in mind, ..., that the

exception is only engaged if the course of justice would be adversely affected.” (Underlining in original)

23. The *DCLG* case is authority that information which is subject to LPP may fall within the exception at 12(5)(b) EIR as disclosure of information which attracts LPP can adversely affect the course of justice.

24. In this case, the Commissioner reached the view that disclosure of the requested information would adversely affect the Council’s ability to defend its position in any further legal challenge (see §§29 & 30 DN).

25. He went on to consider the various public interest factors and balance them in the public interest test (see §§32-43 DN) and concluded that the weight of the public interest in maintaining the exception outweighed the public interest in disclosure.

26. Legal advice was obtained by the Council in relation to the Cornfactor development. The consideration of the Report was delayed because of legal proceedings. Even though these were resolved there continued to be legal issues which could have resulted in further litigation. Disclosure of legal advice could affect the Council’s ability to defend itself from such litigation or in taking legal action itself. If the Council had to reveal its hand this, in our view, would adversely affect the Council’s legal position.

27. We find that the Commissioner was correct to have applied and considered regulation 12(5)(b) EIR in this case.

Complaint 3: Mr Fenning considers that the requested information has been seen by Borough Councillors and this means the information has been seen by third parties and so legal professional privilege does not apply

28. Mr Fenning was aware of the legal advice from the Report which had been published. At §3.7.7 it stated “counsel’s opinion was obtained which confirmed that there was no permission in existence to fell the trees”, and

at paragraph 3.8.1 “Counsel’s advice subsequently confirmed that the developer did have the right to implement all necessary works on site”. At section 4 (paragraphs 4.2 to 4.6) the legal position was set out and the fact that advice was sought from Counsel on 28 January 2014 which

“advised if the Council either sought to revoke the permission or modify the permission there would be significant costs that would have to be paid by the Council, either to the Developer in the form of compensation for loss of the planning permission or in external legal costs to seek to modify the permission. Counsel advised that the Council were not entitled to insist on any protection for the trees in Druitt Gardens because the Developer was entitled under the Part 3 (14)(10(a)(vii) of the Town and Country Planning (Tree Preservation)(England) 2012 to carry out works necessary to implement his planning permission.”

29. There was further reference in the Report to discussions with “Legal” but no other legal advice was set out in the Report.
30. Mr Fenning says that he considers that the requested information has been seen by some of the 24 councillors and this means that the information has been disclosed to ‘third parties’ such that LPP no longer applies to the information. In effect what he is arguing is that LPP has been waived because the information is already in the public domain.
31. In its representations to the Commissioner the Council confirmed that the requested information was given to the Legal Services Manager and was shared with senior officers and certain members of the Council but in confidence.
32. In *Crawford v Information Commissioner & Lincolnshire County Council* EA/2011/0145 at §9 the Tribunal hearing that appeal commented that ‘the Council comprises its officers and elected members and the original request for information should be interpreted as having been addressed to that body’. This case suggests that any attempt to distinguish between advice provided to the Council (staff) and the Councillors is mistaken.

Although we are not bound by this decision we consider the Tribunal's approach in *Crawford* to be correct. In the circumstances of this case we consider that Councillors and Council staff are part of the same body, namely the Council, and that disclosure to them is not disclosure to the public at large particularly where the legal advice was disclosed in confidence.

33. Therefore to this extent LPP is not waived. However, does the publicly available information in the Report at §28 above change this position? It appears to set out legal advice. If this represents the legal opinion, even in summary form, could this waive LPP as the advice would already be in the public domain?

34. In order to decide whether waiver has taken place we consider that the test we should adopt is whether on a balance of probabilities the evidence before us demonstrates that there has been sufficient public disclosure to waive privilege. The purpose of the Report was to examine recommendations and to inform decision-making, and the references to legal advice or opinion in the Report should be read in that context. There is nothing in the Report (including the references to the legal advice) indicating any intention to waive LPP, and this is unsurprising given the purpose of the Report. We can see no evidence of voluntary and deliberate waiver of LLP which attached to the legal advice. We also see no evidence of an implied waiver of LPP and we not consider that references to the advice in the Report constitutes implied waiver, especially since the purpose of the Report is to inform decision makers on a matter which was still open and unresolved. In any case, what has been disclosed in the Report is in no way a full summary of the legal advice.

35. We therefore find on a balance of probabilities that there is no waiver of LPP.

36. Mr Fenning points out that at the time of the Request the Council were, in effect, claiming "litigation" privilege because judicial review proceedings

were still in progress, but that by the time of the internal review the judicial review had been refused. In our view this makes no difference because the scope of the judicial review proceedings was limited and did not rule out further legal proceedings on the issue (in respect of which litigation privilege could still apply), and in any event legal advice privilege (as opposed to litigation privilege) still applies .

Public interest test

37. We have found that regulation 12(5)(b) EIR has been properly applied. Although Mr Fenning made no further challenge to the Commissioner's finding that the exception was engaged and the public interest balance favoured maintaining the exemption, we consider it is incumbent on us to do so.

38. The Commissioner concluded that disclosure of the legal advice would adversely affect LPP. He then went on to examine the public interest factors for and against disclosure (§§32 - 38 DN) and concluded the balance favoured maintaining the exception (§§39 – 42 DN).

39. We accept that disclosure of the disputed information would adversely affect LLP. LLP is a long standing well established and important common law principle designed to allow public authorities and others to be able to consult with their lawyers in confidence and be able to obtain confidential advice. In our view if such advice were to be disclosed in the circumstances of this case, it would adversely affect LLP because of the way it would compromise the position of the Council in respect of the advice given and the requirement for confidential, full and frank exchanges with its legal advisors in obtaining, discussing and pursuing the advice.

40. We acknowledge the very strong public interest inbuilt into the privilege itself which has been accepted by higher courts. Our finding on waiver

above means that this interest is not weakened by any waiver or partial waiver of LPP in this case.

41. We find, therefore, that LLP itself is a very strong public interest in favour of maintaining the exemption in this case.

42. As regards public interest factors in favour of disclosure, there is also a strong public interest in achieving accountability and transparency. The public interest in matters regarding the risks to the trees was evidenced by some 450 letters being sent on this topic prior to the Planning Committee meeting on 9 January 2014. However the Report sets out in detail the matters of public interest regarding the developments proposals for the Cornfactor site (including examining the issues of trees on land abutting the site including Druitt Gardens). In our view the publication of the Report diminishes the strength of this factor in the circumstances of this case. We also note that the Scrutiny and Policy Review Committee debate (held in public in October 2014) afforded detailed scrutiny of the planning issues.

43. We also consider that there is limited public interest, in this case, in requiring a public authority to disclose its legal advice with the principal objective of publicly verifying its quality, and that such an objective is insufficient to outweigh the public interest in maintaining LPP and the confidentiality of legal advice.

44. We therefore find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

45. For the reasons stated above we uphold the DN and dismiss the appeal.

Signed:

Judge

Dated: 27th April 2015