



Appeal number: EA/2016/ 0256

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

ANDREW HOLMES

Appellant

- and -

**THE INFORMATION COMMISSIONER
CUMBRIA COUNTY COUNCIL**

Respondents

**TRIBUNAL: JUDGE ALISON MCKENNA
Mr PAUL TAYLOR
Ms JEAN NELSON**

Sitting in public at Field House, with a video link to Carlisle Combined Court Centre on 7 April 2017

The Appellant appeared in person. The Information Commissioner did not appear. Cumbria County Council was represented by Mr Ben Spencer.

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DECISION

1. The appeal is dismissed.

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REASONS

Background to Appeal

2. On 12 March 2016, the Appellant made a request to Cumbria County Council in the following terms:

“(in relation to Hayton Woods 117000/320)

- 10 *If counsel’s opinion is held on this issue then please supply a copy of the full opinion and of counsel’s instructions”.*

3. The Council refused the information request in reliance upon s. 42 of the Freedom of Information Act 2000 (“FOIA”) because it considered that the information requested attracted legal professional privilege. On internal review, it
15 considered that the applicable disclosure regime was the Environmental Information Regulations 2004 (“EIRs”) and confirmed that it was withholding the requested information under regulation 12 (5) (b).

4. The Information Commissioner issued Decision Notice FER0634202 on 18
20 October 2016, upholding the Council’s decision. She decided that the EIRs was the applicable regime for consideration of disclosure of the requested information, that regulation 12 (5) (b) was engaged, but that the balance of public interest favoured withholding the information.

Appeal to the Tribunal

5. The Appellant’s Notice of Appeal dated 31 October 2016 relied on grounds that
25 (a) the Decision Notice was wrong in law for having characterised the information requested as concerned with “planning” whereas it was actually concerned with the registration of a public right of way, and this subject-matter did not engage regulation 12 (5) (b) as it was not concerned with the “course of justice”, although he did not dispute that the EIRs were the applicable regime; (b) the conduct of County Council
30 officers was such that it was inappropriate for them to rely on legal professional privilege in this case; (c) that legal professional privilege had been waived by the Council; (d) the balance of public interest favours disclosure in all the circumstances.

6. By the time of the hearing, only grounds (c) and (d) were pursued by the Appellant. This was confirmed in the Appellant’s amended skeleton argument dated
35 28 March 2017. We have, accordingly, not considered grounds (a) and (b) in this Decision.

7. The Information Commissioner’s Response dated 7 December 2016 maintained the analysis as set out in the Decision Notice. In response to grounds (c) and (d) relied upon by the Appellant, she submitted as follows.

8. The Decision Notice states at [23] that “*the substance of the advice has not been made public or lost the quality of confidentiality*”. The Appellant’s argument in respect of waiver was that the terms of the Committee Report had waived privilege by stating “*Expert legal advice has been sought from counsel on the matter and counsel has confirmed that this is an appropriate way to proceed*”. The Information Commissioner submitted that this statement did not reveal in any meaningful way the content of the underlying advice and that the Decision Notice was correct to conclude that the Council’s privilege had not been waived.

9. In respect of the public interest balancing exercise, the Information Commissioner submitted that there were no special or unusual circumstances in this case which weighed particularly strongly in favour of disclosure of otherwise privileged information so as to outweigh the very considerable weight to be afforded to the inherent public interest in maintaining the system of legal professional privilege.

10. Cumbria County Council’s Response supported the Information Commissioner’s analysis. It denied that privilege had been waived by the terms of the Committee Report, and submitted that the balance of public interest favoured maintaining the exception to disclosure.

11. The Tribunal conducted an oral hearing by video conference. Neither party called evidence so the matter proceeded on the basis of submissions only. There was no closed session. No authorities bundle was provided but both parties referred us to legal authorities (see *Submissions* below). The Tribunal considered an agreed open bundle of evidence, including submissions and skeleton arguments made by both the parties appearing before us. The Tribunal also considered a closed bundle which contained Counsel’s Advice obtained by the Council but did not contain (for reasons which were unclear) the instructions to counsel.

30 *The Law*

12. The EIRs define “environmental information” as follows:

“..any information in written...form on –

(a) *The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites...*

35 (b) *Factors such as substances, energy, noise, radiation or waste,...emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

40 (c) *Measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities*

*affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
...”*

5 13. The EIRs set out exceptions to the duty to disclose environmental information as follows:

“12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

10 (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.*

12 (2) A public authority shall apply a presumption in favour of disclosure.”

15 14. The category of exception relied upon in this case is regulation 12 (5) (b) which provides that:

“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.....”

20 15. The phrase “*the course of justice*” has been held to provide an exception which is broadly similar in scope to the exemption provided by s. 42 FOIA, which protects from disclosure information subject to legal professional privilege. We consider the case law in relation to the parties’ submissions below.

Powers of the Tribunal

25 16. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA (as applied by regulation 18 EIRs), as follows:

“If on an appeal under section 57 the Tribunal considers -

30 (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

35 *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

17. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

5 *Submissions*

18. Mr Holmes and Mr Spencer both very fairly accepted that they were unfamiliar with the system of precedent in tribunals, with the effect that they had not appreciated that this Tribunal is bound by decisions of the Upper Tribunal but not by decisions of the First-tier Tribunal, which turn on their own facts and do not create precedent.

10 19. Nevertheless, on the question of waiver of privilege, Mr Holmes relied on the decision of a First-tier Tribunal in *Kirkaldie v Information Commissioner and Thanet District Council* EA/2006/001, in which the Tribunal concluded at [41]:

15 *“The Tribunal has compared Councillor Kirby’s reply with the full text of Counsel’s Advice provided to the Tribunal in confidence. The Tribunal finds that the basis on which the advice had been sought and the main opinion given in that advice were mentioned by Councillor Kirby at the public meeting”.*

He submitted that the terms in which Counsel's Advice had been mentioned in the Committee Report in this case (see paragraph 8 above) had similarly waived legal professional privilege by revealing the main opinion given. Mr Spencer, on behalf of
20 the Council, denied that the terms of the Committee Report in this case created a waiver and noted that the Councillor in the *Kirkaldie* case went significantly further than in this case.

20. Both parties referred us to the decision of the Upper Tribunal in *GW v The Information Commissioner, The Local Government Ombudsman and Sandwell Metropolitan Borough Council* [2014] UKUT 0130, in which Judge Turnbull had
25 considered whether legal professional privilege had been waived in different circumstances but decided that the terms of the communications between the Council and the Ombudsman had done “...no more than to summarise the effect of the Advice. They did not cross the line into setting out or summarising the contents of all or part
30 of the Advice” and accordingly found that privilege had not been waived. Judge Turnbull decided in that case that “...in the light of the virtually absolute nature of LPP in English Law...the course of justice would be adversely affected by disclosure”.

21. Mr Spencer helpfully updated the Tribunal to confirm that the legal proceedings
35 which it had considered to be likely when the information request was made were now firmly on foot, with the Administrative Court having given permission for a judicial review. The advice from Counsel which comprised the withheld information was, he submitted, in these circumstances far from stale and related to live legal proceedings. He submitted that this situation strongly favoured maintaining the
40 exception and that the disclosure of advice subject to legal professional privilege would adversely affect the course of justice.

22. In respect of the balance of public interest argument, Mr Holmes made some forceful criticisms of the Council’s process in relation to the registration of the footpath. He stopped short of alleging illegality, but in writing he alleged “unorthodoxy” and in oral submissions “shameful and improper conduct” by Council officers in their conduct of the administrative process leading up to the Council Members’ decision. He submitted that this conduct was such that the public interest favoured disclosure to allow certainty as to whether the assertion made in the Committee Report was true and to demonstrate whether the Council officers were acting with integrity. In answer to a question from the Tribunal, Mr Holmes stated that he did not think it would be disadvantageous to the Council to release its legal advice and that the Claimant in the Judicial Review Proceedings would not be assisted by it.

23. Mr Spencer told the Tribunal that the allegations of impropriety made by Mr Holmes were rejected by the Council and that “*the rights of the Council and its officers arising from this public statement are reserved*”.

Conclusion

24. We are satisfied that the information requested was correctly considered under the EIRs as it is information “on” a measure affecting land. The request was, boldly, for disclosure of information subject to legal professional privilege. That does not serve automatically to engage the exception, but we note that the advice concerned was obtained in relation to a contentious decision and that, at the time of the request, judicial review proceedings were considered likely. Those proceedings are now in train so the advice remains of value. We acknowledge the strength of the arguments for obtaining and holding confidential legal advice in such circumstances and we are satisfied that the information requested in this case touches on “*the course of justice*” so as to engage regulation 12 (5) (b) EIRs.

25. Turning first to the Appellant’s submission that the Council had waived its privilege by the manner in which the legal advice it had obtained was referred to in the Committee Report, we agree with the Appellant that this is a question of fact to be determined on the evidence before us. Following the approach of the First-tier Tribunal in *Kirkaldie* (see paragraph 19 above) we have read the withheld material contained in our Closed Bundle and we are satisfied that the very brief reference to the effect of Counsel’s Advice in the Committee report cannot be described as a summary of the totality of advice given by Counsel. In the circumstances, we agree with the Decision Notice that *the substance of the advice has not been made public or lost the quality of confidentiality* and we have no hesitation in upholding the Decision Notice to the extent of rejecting the Appellant’s case that the Council waived its privilege.

26. With regard to the balance of public interest which falls to be applied under regulation 12 (1) (b) EIRs, we agree with the Decision Notice’s assessment at paragraphs 27 to 34 of the factors to be taken into account on both sides of the balancing exercise. The presumption of disclosure in the EIRs means that we do not start with the scales weighted evenly but with some weight on the side of disclosure.

27. The Appellant's case is that the weight in favour of disclosure is to be increased by the impropriety of Council officers. He has undertaken a forensic analysis of the Committee Reports and has been able to point to several inadequacies of evidence and inconsistencies of approach. He appears to rely on an allegation of bias but his
5 allegations relate to the Council officers only and not to the Council Members who took the relevant decision.

28. Whilst we agree with the Appellant that a case involving corruption or serious impropriety would give added weight to the case for disclosure, we note that there is
10 no evidence before us of a complaint being made to the relevant authorities, nor of any on-going criminal or disciplinary proceedings, nor of any relevant findings of impropriety in relation to the conduct the Appellant relies on. Our assessment is that the evidence of alleged impropriety in this case consists entirely of the Appellant's bare assertions. We note that he did not seek to give sworn evidence and he did not file a witness statement containing a statement of truth, but merely made submissions.
15 We remind ourselves that the Appellant bears the burden of proof to satisfy us on the balance of probabilities of his case and we conclude that we are not satisfied on the evidence before us and to the relevant standard of proof that there is a serious cause for concern here which deserves to be considered in the public interest balancing exercise.

29. On the side of maintaining the exception is the considerable weight of the decision of a Three Judge Panel of the Upper Tribunal, chaired by the then-Senior President of Tribunals, in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (referred to at paragraph 24 of the Decision Notice), underlining the importance of the system of legal professional privilege to a fair and proper judicial
20 process. Mr Holmes' submission that there would be no injustice to the Council in releasing its legal advice to the world at large (which would be the effect of disclosure under FOIA or EIRs) was, we found, a surprising one for a retired solicitor. The Upper Tribunal considered in *DCLG* that weight should be attributed not only to the need to maintain legal professional privilege in that case (where Judicial review proceedings had also been threatened) but also to the more generalised risk that
25 disclosure would weaken the confidence of public bodies and their advisers in the efficacy of the system of legal professional privilege.
30

30. We agree with the Decision Notice that, in the circumstances of this case, the course of justice would be adversely affected by the disclosure of the Council's legal
35 advice because it would place the Council at a disadvantage in legal proceedings which were reasonably anticipated at the time of the request and have since come to pass. We also find that the public interest generally favours maintaining the exception so as to withhold from disclosure information subject to legal professional privilege. There may be exceptions to that approach, but we are not satisfied that this is such a
40 case.

31. For the above reasons, we discern no error of law in the Decision Notice and this appeal is dismissed.

(Signed)

ALISON MCKENNA

DATE: 9 May 2017

5 PRINCIPAL JUDGE