First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0213

Decided without a hearing
On 30 January 2019

Before

JUDGE ANTHONY SNELSON
PIETER DE WAAL
HENRY FITZHUGH

Between

MR CHRISTOPHER SMITH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

The unanimous decision of the Tribunal is that the appeal is dismissed.

REASONS

Introduction

1. The Appellant, Mr Christopher Smith, to whom we will refer by name, is a resident of East Grinstead, in West Sussex. On 10 December 2017 he wrote to Mid Sussex District Council ('the Council') requesting information connected with a planning decision relating to a local property. His request reads:

> **I should be pleased if you would provide me with the name of the lawyers who gave their [advice] to the Council and an assurance that they have not or do not work for your Council in any other capacity. I should also be pleased to receive their written communication to your Council on this matter. I wish to seek this under the Freedom of Information Act.**

2. It may help to put the request into context. Mr Smith was unhappy about the planning decision of November 2017 to approve a proposed development, partly at least because an identical application had been rejected in 2016. On inquiry he was told that the Council had based its decision on legal advice that the proposal sufficiently mitigated any adverse impact on the Ashdown Forest Special Protection Area and Special Area of Conservation. The earlier application had been refused by the Council partly because of concerns about such an impact and an appeal to the Inspector on that ground had also failed.

3. The Council replied briefly to the request on 11 December 2017 and more fully on 2 January 2018. It explained that the advice sought had been supplied by a named planning barrister who was in independent practice and not a Council employee. It refused to provide a copy of the advice, citing the exemption under the Freedom of Information Act 2000 ('FOIA'), s42(1), which applies to information covered by legal professional privilege ('LPP'). Much more recently, in answer to a further request from Mr Smith, it confirmed that it had instructed the barrister before, in another matter.

4. Mr Smith was dissatisfied. Following a review, the Council notified Mr Smith on 18 January 2018 that it now considered the information requested to fall within the scope of the Environmental Information Regulations 2004 ('EIR') but that, despite the statutory presumption in favour of disclosure, it remained of the view that the information was legally privileged and that its disclosure would adversely affect the course of justice. Accordingly, relying on EIR reg 12(5)(b), it maintained its refusal.

5. By a letter of 21 March 2018 Mr Smith complained to the Respondent ('the Commissioner') about the way in which the Council had dealt with his request.

6. The Commissioner proceeded to carry out an investigation. This took the form of viewing the disputed material and considering the written representations of Mr Smith and the Council.

7. The material consists of three documents prepared by the barrister: an 'Advice', an 'Addendum Advice' and an email addressed to the Council. Two were delivered in 2015 and one in April 2017 (*ie* between the two apparently inconsistent planning decisions).

8. By a decision notice dated 7 September 2018 the Commissioner determined that the Council had correctly applied the EIR reg 12(5)(b) exception to withhold the disputed information.

9. By a notice of appeal dated 3 October 2018, Mr Smith contended that the Commissioner's decision was wrong. He argued that the Council's 2016 decision and the Planning Inspector's decision dismissal of the subsequent appeal had been correct and suggested that the approval decision of November 2017 had been based on legal advice against "losing revenue from the payments … received from developers to allow them to use council land to overcome the requirements of the Habitat Regulations.[1]" On this basis, release of the legal advice was necessary.

The applicable law

10. EIR, reg 5(1) requires a public authority holding "environmental information" to make it available on request.

11. "Environmental information" is defined broadly in reg 2(1) as:

> **… information in written, visual, aural, electronic or any other material form on –**
>
> **(a) the state of the elements of the environment …**
> **(b) factors … affecting or likely to affect the elements of the environment …**
> **(c) measures (including administrative measures), such as policies, legislation, plans …**

12. Reg 12 sets out exceptions to the reg 5(1) duty. One such, under reg 12(5)(b), permits a public authority to refuse to disclose information to the extent that its disclosure –

> **… would adversely affect … the course of justice …**

These words have been interpreted by the Upper Tribunal ('UT') as applying to legal professional privilege ('LPP') (see *DCLG v Information Commissioner and WR* [2012] UKUT 102 (AAC)).

13. Even if an exception applies, a public authority can refuse to disclose requested environmental information only if, "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information" (reg 12(1)(b)). Under EIR there is a statutory presumption in favour of disclosure (reg 12(2)).

14. LPP takes two forms: legal advice privilege and litigation privilege. The former is in play here. It applies to confidential communications between a lawyer and client for the purposes of supplying or seeking legal advice.

15. The importance of LPP in our legal system cannot be overstated. In *R v Derby Magistrates' Court ex p P* [1996] 1 AC 487, 507, Lord Taylor described it as, "a fundamental condition on which the administration of justice as a whole rests". In *R (Morgan Grenfell) v Special Commissioners* [2003] 1 AC 563, 606-7, Lord Hoffmann, explaining its rationale, observed, "… advice cannot be effectively

[1] The Habitats and Species Regulations 2010

obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."

16. The public interest test has been debated in the context of the LPP exception in a number of reported decisions at first instance and on appeal. A thread running through them is the emphasis upon the inherent public interest in maintaining LPP. It has been pointed out that this public interest is not confined to the protection of the public authority's confidential communications in the particular case under consideration: it also argues for the need to guard against the risk that ordering disclosure would undermine the confidence of public bodies and their advisers in the efficacy of the principle of LPP (see the *DCLG* case already cited, para 67).

17. Some of the reported cases were brought under what might be seen as the less stringent regime (from the public authority's point of view) of FOIA, s42. But the UT has held that in the context of LPP the proper approach under EIR is broadly the same (see again the *DCLG* case, para 55).

18. The appeal is brought pursuant to the Freedom of Information Act 2000, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal consider –**
>
> **(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,**
>
> **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.**
>
> **(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

Analysis and conclusions

19. There appears to be no dispute that EIR is the applicable regime and that reg 12(5)(b) is engaged. The crux of the case is the disagreement about where the public interest lies.

20. We are satisfied that the public interest in maintaining the exception clearly outweighs the public interest in disclosure. We have three main reasons for our conclusion. The first is the compelling public interest in upholding the principle of LPP. We will not repeat what we have already said on that matter.

21. Secondly, Mr Smith does not require the barrister's advice in order to understand the Council's planning decision of November 2017 and its reasons for arriving at an outcome at variance with its 2016 decision and the Planning

Inspector's dismissal of the resulting appeal. Those reasons were recited carefully in the Council's case officer's report of 15 November 2017, which includes full and clear treatment of the subject of special interest to Mr Smith, namely of the conservation of Ashdown Forest and in particular "mitigation" measures in the form of financial contributions. Mr Smith was perfectly entitled to press the Council to explain its decision-making. He has done so and received a full explanation. Non-disclosure of the legal advice does not leave him in the dark as to the reasons for its actions.

22. Thirdly, the advice (which we have seen and considered) is general. It was not designed to address any particular planning application or proposal. Rather, it responded to questions on points of principle. The advice was sought in order to inform planning policy over time. It can fairly be said to be 'live' advice, intended to be relied upon at the time when it was requested and into the future. The Council's position would obviously be severely prejudiced if such advice were placed into the public domain.

23. It follows that the appeal must be dismissed.

Anthony Snelson
Judge of the First-tier Tribunal

Dated: 20 February 2019
Promulgated: 20 February 2019