



Neutral citation number: [2023] UKFTT 511 (GRC)

Case Reference: EA/2022/0209

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Decided without a hearing

**On: 6 June 2023
Decision given on: 19 June 2023**

Before

**TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER KATE GRIMLEY-EVANS
TRIBUNAL MEMBER MARION SAUNDERS**

Between

OWAIN ARFON JONES

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 6 July 2022 (IC-138226-L8R3, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about legal advice concerning the supply of crack pipes requested from the Chief Constable of South Wales Police (“South Wales Police”).
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 24 July 2021, the Appellant wrote to South Wales Police and requested the following information (the "Request"):

"I request a copy of legal advice to Chief Constable Vaughan regarding Chief Constables and PCC's signing a letter of comfort to drug workers which allows them to supply crack pipes to crack users as a harm reduction and protects them from prosecution under Section 9, Misuse of Drugs Act 1971"

4. The background to the Request relates to the legality of drug workers supplying crack pipes, to reduce harm to crack users in Wales. This can reduce the risk of the spreading of disease through sharing of pipes. However, doing so is an offence under the Misuse of Drugs Act 1971. The Appellant was Police and Crime Commissioner for North Wales. He says that there was an agreement in principle that drug workers should be given a "letter of comfort" against prosecution for supplying crack pipes. However, he says that the proposal was not progressed after it was passed to South Wales Police and they obtained legal advice.

5. South Wales Police responded on 19 August 2021 and refused to supply the information on the basis that it was exempt under section 42 FOIA (legal professional privilege, "LPP").

6. The Appellant requested an internal review on 19 August 2021. South Wales Police responded on 15 October 2021 and upheld its decision that the information was exempt under section 42.

7. The Appellant complained to the Commissioner, who decided that section 42 FOIA had been applied correctly:

- a. The withheld information was covered by legal advice privilege.
- b. There were various public interests in favour of disclosing information, particularly accountability for the quality of decision making and ensuring decisions are made based on good quality legal advice, on the impactful topic of drugs in the community.
- c. These interests were outweighed by the public interest arguments in maintaining the exemption, including the negative impact on the frankness of legal advice or the extent to which it is sought, and the inbuilt interest in LPP.

The Appeal and Responses

8. The Appellant appealed on 31 July 2022. His grounds of appeal are essentially that the public interest balance has not been weighed correctly:

- a. The Commissioner's justification suggests general public interest will never be sufficient to justify legal advice being disclosed.
- b. There is no greater general public interest than where the legal advice has a life or death impact - if a clean legally supplied glass pipe would save the life of just one crack user's life then the letter of comfort would have served a purpose.
- c. The legal advice is being used as a justification to kick the issue into the long grass and avoid their core function of protecting life and property. The appeal is about what is right, and the legal advice sought is about advising South Wales Police on their core responsibility of saving life and property.

- d. The Commissioner has given too much credibility to the public interest to the parties applying the exemption and not enough to the general public interest, and the general public interest is being trampled on.

9. The Commissioner's response maintains that the Decision Notice was correct. The Commissioner correctly took into account the in-built inherent public interest in maintenance of the exemption and the fact that only very strong countervailing factors would tip the balance in favour of overriding the exemption and for disclosure to be appropriate. The Commissioner says that the arguments set out in the appeal do not raise any fresh issues that would alter his conclusion that the public interest balance remains firmly in favour of maintaining the exemption.

Applicable law

10. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled—*
 - (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

2 Effect of the exemptions in Part II.

.....

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
 - (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the 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.*

.....

58 Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers—*
 - (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.*

11. Legal professional privilege protects the confidentiality of legal communications. It has two parts – legal advice privilege, and litigation privilege. Legal advice privilege concerns confidential communications between lawyer and client. It applies to communications between a client and their legal adviser, acting in a professional capacity, for the dominant purpose of seeking or giving legal advice or assistance in a relevant legal context (***Three Rivers District Council v Governor***

and Company of the Bank of England (no 6) [2004] UKHL 48). Legal advice privilege also extends to wider communication of privileged advice, such as internally to a client's Board of Directors (**Civil Aviation Authority v R Jet2.com Ltd** [2020] EWCA Civ 35).

12. Section 42 FOIA is subject to the public interest test, meaning if information falls within this exemption it can be withheld if, "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*" (section 2(2)).

13. It has been accepted in numerous cases that there is a strong public interest built into legal privilege, based on the interest in public bodies being able to receive frank legal advice in order to assist them to make appropriate decisions. This was confirmed by the High Court in **DBERR v O'Brien and IC** [2009] EWHC 164 (QB) – "*The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.*" (Wyn Williams J at para 53).

Issues and evidence

14. The Appellant does not dispute that LPP applies, and so the exemption in section 42 FOIA is engaged by the information he has requested. The issue for this Tribunal is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

15. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the withheld information and an unredacted version of a communication from South Wales Police to the Commissioner.

Discussion and Conclusions

16. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. In this case, that means we will conduct our own analysis of the public interest factors in favour of and against disclosure of the information.

17. We have considered the Appellant's arguments as follows.

18. ***The Commissioner's justification suggests general public interest will never be sufficient to justify legal advice being disclosed.*** The Appellant is correct that LPP is not and should not be treated as an absolute exemption. In some cases, there will be sufficient general public interest to justify disclosure of information that is subject to LPP. However, the caselaw is clear that LPP has inbuilt weight. It is an important principle that protects the administration of justice because it enables open communications and the provision of free and frank legal advice,

which is strongly in the public interest. The mere fact that LPP applies to the information means it is in the public interest for that privilege to be upheld. It is not necessary for the person seeking to protect the information to show any additional prejudice or chilling effect that would be caused by disclosure (See **DBERR** paragraph 51 and **Callender Smith v Information Commissioner & Crown Prosecution Service** [2022] UKUT 60 (AAC), paragraph 50). An appellant must therefore show that there are features supporting disclosure which are sufficient to outweigh the public interest in protecting legal professional privilege.

19. This does not mean the weight is always the same. As accepted by the Upper Tribunal in **DCLG v Information Commissioner & WR** [2012] UKUT 103 (AAC), in relation to the legal privilege under the Environmental Information Regulations 2004, “...the weight that should properly be given to the exemption in any event, by reason of the risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of [legal professional privilege], may vary from case to case. If, for example, the requested information is very old, or relates to matters no longer current, a disclosure may damage that confidence to a lesser extent than if the information was recent, or relates to matters still current.” (paragraph 45). There may be factors that limit the importance of protecting LPP in a particular case. Similarly, there may be factors which increase that importance, such as the context of the legal advice and the risk of prejudice to other related matters. The starting point of in-built weight, however, always applies. This is based on the general importance to the public of protecting LPP.

20. We have applied this guidance when conducting our own balancing of interests in this case, as set out below.

21. ***There is no greater general public interest than where the legal advice has a life or death impact - if a clean legally supplied glass pipe would save the life of just one crack user's life then the letter of comfort would have served a purpose.*** We agree that there is more than a basic public interest in transparency and accountability in this case. The subject matter of the Request is an important topic relating to the health and safety of drug users and police policies on the issue. However, the Request relates to legal advice provided to South Wales Police, not the actual policy decision or action taken in response to any advice. As noted by the Commissioner in his response, the point made by the Appellant is more about the action taken by South Wales Police than the advice itself. Nevertheless, the advice is part of the picture feeding into the policy decision, and this enhances the public interest in the information.

22. ***The legal advice is being used as a justification to kick the issue into the long grass and avoid their core function of protecting life and property. The appeal is about what is right, and the legal advice sought is about advising South Wales Police on their core responsibility of saving life and property.*** Again, we agree that the public interest in the information is enhanced by the context of the Request – advice on an important issue relating to the health and safety of drug users.

23. ***The Commissioner has given too much credibility to the public interest to the parties applying the exemption and not enough to the general public interest, and the general public interest is being trampled on.*** This is the key issue in this case. We have conducted our own balancing of the interests, taking into account the general public interest in the information.

24. As already noted, there are various public interests in disclosure. There are general interests in transparency and accountability, and in particular ensuring that the police are making good decisions and acting on the basis of appropriate legal advice. These public interests are added to

by the fact the topic of the Request involves issues of drug safety in the community. These issues are topical and important, and involve questions about what is being done to protect the health and safety of drug users. The legal advice that had been requested forms part of the picture of how South Wales Police made a decision about whether to progress a policy of supplying pipes to crack users.

25. We have weighed these interests against the public interest in preserving LPP in this case. As set out above, LPP has significant inbuilt weight. Preserving the confidentiality of legal advice is strongly in the public interest because it enables open communications and the provision of free and frank legal advice. This ability of individuals to obtain legal advice without the risk of it being disclosed publicly is critical to the operation of the legal system and the administration of justice. There are some factors which add to this weight in this case. There is a particular interest in ensuring that the police are able to obtain frank and confidential legal advice when carrying out their core functions on behalf of the public. The fact that the Request related to legal advice provided to the police adds to the public interest in disclosure - but it also adds to the public interest in maintaining confidentiality so that the police and their legal advisers can communicate with each other frankly and ensure that decisions are based on the best possible advice.

26. Guided by the decision in **DBERR**, we have considered whether the features supporting disclosure (including the underlying public interests which favoured disclosure) are of at least equal weight to the public interest in withholding information to which LPP applies. We find that they are not. The inbuilt weight of LPP and specific interests in ensuring the police obtain good advice are very strong. We have seen the withheld information in the closed bundle. There is nothing in that information to raise concerns about the appropriateness of the advice, or any other special features which might enhance the public interest in disclosure. The advice is on a recent issue that remains current, so is not an example of information where the disclosure would cause limited damage to confidence (as referred to in **DCLG**). Although there are various public interests in disclosure, these are not sufficiently strong to equal or outweigh the very strong public interests in withholding the information. The advice relates to legal advice on a specific issue. This may have influenced the decisions made by South Wales Police, but does not actually reveal how or why the policy that the Appellant is concerned about was not progressed further.

27. The Appellant has complained about the balance struck by the Commissioner, and says that the general public interest has been trampled on. We disagree. The key point is that withholding information that is subject to LPP is strongly in the general public interest. There need to be good reasons to disclose such information. Having conducted our own balancing of the interests, we find that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

28. We dismiss the appeal for the reasons explained above.

Signed Judge Hazel Oliver

Date: 19 June 2023