



Neutral citation number: [2023] UKFTT 895 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2022/0416

Heard by CVP on 24 August 2023
Decision given on: 23 November 2023

Before

JUDGE ANTHONY SNELSON
TRIBUNAL MEMBER RAZ EDWARDS
TRIBUNAL MEMBER ROSALIND TATAM

Between

NATIONAL HIGHWAYS LTD

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

DR EMMA TRISTRAM

Second Respondent

DECISION

On hearing Mr M Dale-Harris, counsel, on behalf of the Appellant and the Second Respondent in person, the Tribunal unanimously determines that the appeal is allowed. The exception under the Environmental Information Regulations 2004, reg 12(5)(b) applies and the public interest under reg 12(1)(b) favours maintaining the exception.

AMENDED REASONS¹

Introduction

Factual background

1. The Appellant, ('National Highways'), formerly the Highways Agency and later Highways England, is a government-owned company charged with operating, maintaining and improving motorways and major A roads in England.
2. The Second Respondent, Dr Emma Tristram, has long taken an active interest in the controversial A27 Arundel Bypass project ('the Project'). She lives near the town.
3. A short summary of the Project, which has a long history and has seen a number of iterations,² will suffice here. It is classified as a Nationally Significant Infrastructure Project ('NSIP'). Large sums of public money have already been spent on the planning and consultation carried out to date. The cost of implementation (whatever form it finally takes) will be enormous. Numerous factors other than cost to the public purse (social, economic, ecological and environmental considerations, to name a few) are also in play. The South Downs National Park ('SDNP') lies very close by and the public interest in protecting its precious natural resources has long featured in the debate.
4. Different 'Preferred Routes' were announced in 2018 and 2020, after consultation in each case. The 2018 proposal was met by two judicial review applications and National Highways agreed to consult afresh.
5. Further consultation was held between August and October 2019, in which proposals for five new routes were canvassed. These were identified on the plans by colour. For present purposes, it is necessary to mention only the 'Magenta Route' and the 'Grey Route'. The Magenta Route was similar to the May 2018 proposal, but reduced the section of proposed dual carriageway that would pass through the SDNP. The Grey Route was the only one which would avoid the SDNP altogether.
6. National Highways initially favoured the Magenta Route as representing the best balance between the many competing interests. However, following

¹ This document incorporates very minor amendments to the reasons originally published, at paragraphs 4 (second sentence) and 41 (final sentence) only.

² A fuller narrative can be read in the skeleton argument prepared on behalf of National Highways, paras 5-22.

receipt of two written legal advices in July 2020³, its position changed and it adopted the Grey Route as the best option.

7. In a note dated 6 August 2020 to the Department for Transport ('the Briefing Note'), National Highways set out its main reasons for favouring the Grey Route, including a reference to the QCs' advice, which was said to have 'over-ruled' prior advice from a firm of solicitors that the Magenta Route would have a 50% chance of securing Development Consent under the Planning Act 2008 and associated Regulations, putting the prospects at less than 20%.
8. In October 2020 National Highways announced the Grey Route as the preferred option and issued a consultation paper and a Scheme Assessment Report setting out its principal grounds.
9. Further work on the scheme design followed but the Project has since been put on ice owing to a decision by central government to re-allocate it to the Road Improvement Strategy for 2025-30.

Procedural history

10. On 7 February 2022, Dr Tristram wrote to National Highways requesting information in these terms:

I would like to see QCs' advice to Highways England that is mentioned in the letter from Arundel Bypass project leader Jason Honess to the Department of Transport on 6 August 2020⁴ (acquired by FOI)...

We will refer to it as 'the request'.

11. On 7 March 2022 National Highways refused the request, citing the Freedom of Information Act ('FOIA') 2000, s42 (legal professional privilege).
12. On 8 March 2022 Dr Tristram requested an internal review.
13. On 5 May 2022 National Highways provided the outcome of its internal review. It acknowledged that the request should have been dealt with under the Environmental Information Regulations 2004 ('EIR') but maintained its refusal to disclose, citing EIR, reg 12(5)(b) (the course of justice and inquiries).
14. Dr Tristram then complained to the Commissioner about the way in which her request had been handled. An investigation followed.

³ These have been referred to throughout as the 'QCs' advices'. In fact, one is a joint advice, bearing the names of leading and junior counsel. The other bears the name of (different) leading counsel only. And of course, all former QCs are now KCs. But, for convenience, we will not tinker with the agreed terminology.

⁴ This was a reference to the Briefing Note.

15. By a decision notice (ref. IC-174223-P9L3) dated 9 November 2022 ('the DN') the Commissioner determined that the exception under EIR, reg 12(5)(b) relied upon was engaged but that the public interest lay in disclosure. Accordingly, he ordered National Highways to disclose the information.
16. By a notice of appeal dated 7 December 2022, National Highways challenged the Commissioner's adjudication.
17. The Commissioner resisted the appeal in a response dated 13 February 2023, as did Dr Tristram, in two documents, one undated and the other dated 13 February 2023.
18. To these, National Highways served a reply dated 27 March 2023, to which Dr Tristram responded with further representations dated 4 April 2023.
19. In the course of the proceedings some uncertainty about the precise scope of the request was resolved, Dr Tristram unambiguously confirming that she was concerned only with two written advices received by National Highways in July 2020.
20. The appeal came before us in the form of a public hearing held by Cloud Video Platform, with one sitting day allocated. We were satisfied that it was just and in keeping with the overriding objective to adopt that procedure.
21. National Highways was represented by Mr Matthew Dale-Harris, counsel. Dr Tristram appeared in person and was assisted by Mr Edmund Camerer Cuss, who attended to support her. The Commissioner did not appear, preferring to rely on his written case.
22. We heard oral evidence from Mr Christopher Welby-Everard, a Regional Delivery Director within Highways England. He produced a witness statement. Dr Tristram did not choose to cross-examine him, but some questions were put to him by the Tribunal.
23. We also read the documents to which we were referred in the substantial open and closed bundles before us. The skeleton arguments of Mr Dale-Harris and Dr Tristram and a further document jointly prepared by Dr Tristram and Mr Camerer-Cuss which, with our permission, Mr Camerer-Cuss read out at the end of the hearing, completed the paperwork before us.
24. The hearing included a brief closed session, from which Dr Tristram and her party were necessarily excluded. When we resumed in 'open', Mr Dale Harris read out a short 'gist', which we had approved.

The Applicable Law

EIR

25. EIR, reg 5 includes:

(1) Subject to ... and in accordance with ... a public authority that holds environmental information shall make it available on request.

26. EIR, reg 12 makes provision for exceptions to the duty to disclose environmental information. It includes:

(1) Subject to paragraphs (2), (3) ... a public authority may refuse to disclose environmental information requested if -

- (a) an exception to disclosure applies under paragraphs ... 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.

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

...

(5) For the purposes of para (1)(a), 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; ...

The Tribunal's powers

27. The appeal is brought pursuant to the FOIA, 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.

Authorities

28. Although EIR, unlike FOIA (see s42), does not contain an explicit exception to the right to disclosure of information to which legal professional privilege ('LPP') attaches, it is not in question that reg 12(5)(b) operates in such a case. The most recent and authoritative illustration is the judgment of a three-

member panel of the Upper Tribunal ('UT'), chaired by Carnwath LJ, in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC). We make no apology for quoting extensively from it.

29. Starting with the nature of LLP and the rationale for it, the UT stated:

"36. We can confine our consideration to the branch of LPP known as legal advice privilege, under which communications between a client and his lawyer, for the purpose of obtaining or giving legal advice (whether or not in relation to actual or contemplated litigation) are privileged from production. In other words, the client will not be required by a court to disclose them, unless one of the very limited exceptions (such as waiver) applies. We do not need to consider the similar protection also afforded, under the branch of LPP known as litigation privilege, to other documents (e.g. communications with third parties) brought into being for the purposes of litigation.

37. The development of the doctrine of legal advice privilege, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in *Reg v Derby Magistrates Court, Ex p. B*, [1996] AC 487, and then summarised by him as follows at p.507D:

"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

38. Lord Taylor went on (at p. 508C) to reject a submission that, by analogy with the doctrine of public interest immunity, there might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance:

"But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined."

30. The UT went on to consider the exemption under FOIA, s42, referring to the approach upheld by Wyn Williams J in *DBERR v IC & O'Brien* [2009] EWHC 164 (QB):

42. Section 42 of FOIA contains a qualified exemption for "information in respect of which a claim to legal professional privilege could be maintained in legal proceedings". In *DBERR v IC & O'Brien* [2009] EWHC 164 (QB) Wyn Williams J, on an appeal (which at that time lay to the High Court) from the Information Tribunal, concluded at para. [39] that in previous decisions under s.42 the Information Tribunal had taken the correct approach to the public interest balancing exercise.

That approach had been summarised in *Rosenbaum* (EA/2008/0035/ 4.11.2008), in a passage approved by Wyn Williams J, as follows:

“.....the Tribunal does not agree with Mr Rosenbaum that LPP merits only “some weight” From the cases referred to above, this Tribunal is satisfied that LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which the balancing test applies, but it can be countered by equally weighty arguments in favour of disclosure. If the scales are equal disclosure must take place.”

43. Wyn Williams J. went on at [53] to hold that “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.”

44. In other words, although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption.

45. Mr Bates accepted that the weight which 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 LPP, 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. We consider that he was right so to accept.

46. The jurisprudence of the FTT further indicates that the factors in favour of maintaining the exemption are not necessarily limited to the general one just indicated, but may include the effect which disclosure would have in the individual case. For example, if the dispute to which the advice relates is still live at the time of the request, it may be considered unfair that the requester should have the advantage of access to the authority’s advice, without affording the authority the same advantage: West EA/2010/0120 (15 October 2010), at [13(5)].

31. At para 55 the UT held that the proper approach to the public interest balancing test under EIR, reg 12(5)(b) was ‘broadly the same’ as in cases under FOIA, s42, save for the ‘potentially important’ qualification that in the case of environmental information, the public authority must apply a presumption in favour of disclosure (reg 12(2)).
32. Addressing the public interest balance (paras 72-74) against the undisputed facts and the facts found by the First-tier Tribunal, the UT held that there were no ‘special or unusual factors’ to justify not giving the ‘effect on the course of justice in terms of a weakening of confidence in the efficacy of LLP generally ... the very considerable weight it will generally deserve’ (para 72(a)), and that that factor, coupled with the unfairness point (mentioned by reference to West in para 46 (cited above)) ‘strongly outweighed’ the ‘particularly weak’ factors in favour of disclosure (para 74).

The Issue

33. Before us, four matters were common ground. First, the information requested was 'environmental information' within the scope of EIR. Second, the QCs' advice was privileged in that it attracted LPP. Third, the privilege had not been waived.⁵ Fourth, the exception under EIR, reg 12(5)(b) was engaged.
34. Accordingly, the parties were agreed that the appeal turned on one issue alone: whether, on a proper application of EIR, reg 12(1)(b), in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information.

Analysis and Conclusions

35. In our view, the Commissioner's decision was surprising and clearly wrong, for nine reasons. In the first place, his decision is flawed by the failure to attach sufficient weight to the crucial role which LPP plays in our justice system and the consequential need for a compelling reason to be shown to justify denying any public body the right to rely on its protection in any particular case. One has only to read the decision notice as a whole to see that its author has not taken account of the guidance of the UT in the *DCLG* case. It treats LPP as simply one public interest to be weighed in the balance like any other. While it grants that there are 'clearly strong arguments' in favour of withholding legal advice (para 30), it nowhere acknowledges the fact that LPP carries weight of a different order from that to be attached to other exemptions (see case-law cited in *DCLG*, para 42). It does not make even incidental reference to the rationale underlying LPP or its particular importance in our domestic justice system. It passes no comment on National Highways' argument that upholding the request would undermine its ability to seek advice in the future (para 27). And it contains no reference at all to the wider and even more fundamental point that *any* encroachment on the protection afforded by LPP will inevitably damage the confidence of public bodies in its efficacy.
36. Second, the central flaw is also evident in the factors which the Commissioner found sufficient to tip the public interest balance in favour of disclosure. In particular, he saw the extent of opposition to the Grey route (from residents, the local authority and some special interest groups) and the anticipated cost of the project as key considerations (DN, especially at para 34: 'Ultimately, there are concerns about the project in question and, given its cost, the Commissioner considers that transparency is paramount.') This betrays the fundamental nature of the misunderstanding. The fact that a particular plan or project is significant and may have a severe impact on particular groups or communities or on public finances cannot begin to justify the disclosure of privileged advice. If the law were otherwise, LPP would long ago have become a dead letter. What the case-law shows is that any arguable attempt to

⁵ Solicitors acting for Dr Tristram did pursue a waiver argument in the course of the Commissioner's investigation, but that did not feature in her case on appeal. Indeed, she explicitly disavowed any such contention.

circumvent LPP must rest on a special factor or circumstance relating to the *advice*, not to the wider project or controversy with which the advice is concerned.

37. Third, factors or circumstances relating to the QCs' advice (rather than the wider underlying controversy) argued powerfully against, not in favour of, disclosure. Four are of obvious significance. The first is that the advice was recent. (It is axiomatic that our focus must be on the situation at the time of the refusal of the request, but we agree with Mr Dale-Harris, for what it is worth, that, in context, it is still recent today.) The second factor, intimately linked to the first, is that, at the relevant time (and now, we would say), the matters to which the advices were directed, including in particular the proposed 'Grey' scheme, were 'live' and current. The third point is that, given the history, there was (and, we think, is) a strong possibility of the proposal attracting a legal challenge. Lastly, there is no suggestion here that the advice has been misinterpreted or, worse, manipulated or misrepresented by National Highways (in the Briefing Note or elsewhere). Very properly, Dr Tristram does not make an allegation which she is in no position to substantiate. In her written case, she does speculate on what disclosure of the advice *might* reveal, but speculation is no basis for a frontal assault on a hallowed legal protection. For good measure we should add that, having studied the closed material, we see nothing pointing to any impropriety on the part of National Highways relating to the advice or the way in which it was referred to in the Briefing Note.
38. Fourth, we also see some force in the further point tending against disclosure in LPP cases (discussed by reference to *West* EA/2010/0120 (15 October 2010), para 13(5)) in *DCLG*, para 46) that it may be seen as unfair, at least where the dispute remains 'live', if the requester has sight of the public authority's advice and the latter does not enjoy a corresponding advantage.⁶
39. Fifth, we agree with Mr Dale-Harris that the point taken by the Commissioner (response, paras 24-26) that his decision would not affect public confidence in LPP because it did not create a 'precedent' is a poor one. We have two reasons. First, the fact that a decision of the Commissioner in a particular case is not binding on other parties misses the point. The 'precedent' likely to undermine public confidence in LPP consists of the simple fact of an adjudication having been made which derogates from the cardinal principle that LPP will protect the confidentiality of legal advice, absent a weighty and compelling reason to the contrary. Every derogation serves to reduce public confidence in the effectiveness of the protection. Second, the general expectation must be that the Commissioner will discharge his functions in a consistent way, so that comparable cases will result in the same or similar outcomes.

⁶ Disclosure under freedom of information legislation being to the whole world, the advantage would not be limited to the requester.

40. Sixth, we also see no force in points made by the Commissioner about the QCs' advice having been instrumental in bringing about, or justifying, a change in National Highways' position on the preferred route. It is not in dispute that legal advice was a factor behind its change of stance. The Briefing Note says as much and refers to some central considerations. But none of this warrants disclosure of the analysis and reasoning on which the advice was based. The suggestion that a public authority's claim to rest a decision to change its strategy on legal advice amounts to a special circumstance depriving it of LPP protection (if that really was the suggestion) is obviously untenable.
41. Seventh, there is also, we think, nothing in Dr Tristram's complaint about National Highways not specifying or explaining the advice received in the Briefing Note (or any other published document). One would not expect a public authority to do so. One would expect a public authority to do what National Highways did, which was to set out in broad terms the substantive justification for the proposals it was making. To state the obvious, the fact that it said in the Briefing Note that it was relying on legal advice did not entitle Dr Tristram to sight of the advice.
42. Eighth, Dr Tristram's other points (including those put forward by Mr Camerer Cuss) really added nothing of substance for our purposes. They largely suffered from the defect already discussed, of concentrating on her strong sense of grievance about the history of the Arundel bypass dispute from 2017 onwards. Her concerns seem to focus particularly on the consultation aspect. We fully accept that she, like many other local residents, is much aggrieved by what has happened and greatly concerned about what may lie ahead. She may be right that National Highways is worthy of blame. We have no view about that beyond accepting entirely that the saga to date is troubling and serious. But, for reasons already given (see particularly our second point above) this helps not at all on the question of LPP. Dr Tristram says that she believes that, apparently in relation to consultation, *Gunning* and *Nolan* principles were breached (presumably by National Highways). We agree with Mr Dale-Harris that there appears to be no evidence for these allegations. But in any event, if she is right, her remedy (if any) lies elsewhere, and not in her information request. Apart from anything else, there was never any basis for supposing that the advice was to any extent directed to any question of breach of the *Gunning* and/or *Nolan* principles. And having read it, we can confirm that it was not.
43. Ninth, the Commissioner appears to have attached disproportionate importance to the presumption in favour of disclosure under reg 12(2). The presumption is certainly important. In the first place, it serves as a starting-point. The public authority must approach any request for environmental information by asking whether a sufficient ground is shown for refusing disclosure. Moreover, the presumption does not disappear once the correct starting-point has been adopted. It must permeate the decision-maker's

reasoning throughout. And if at the end the scales are balanced, the presumption wins the day for the requester. But these things having been said, the presumption is only that. By itself, it is no counterweight to the powerful imperative for LPP to be upheld unless a compelling reason to the contrary is made out.

Conclusion and Outcome

44. For all of these reasons, we are satisfied to a high standard that the Commissioner's decision was not in accordance with law and cannot stand.
45. The appeal is allowed. The exception under reg 12(5)(b) is engaged and the public interest under reg12(1)(b) favours maintaining the exception. The information requested is protected by LPP and National Highways is not required to disclose it.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

Dated: 21 October 2023
Re-dated 20 November 2023