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**Case Reference: EA/2023/0386**

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

Heard: by determination on the papers

Heard on: 11 January 2024

15 Decision given on: 17 January 2024

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Before:  
Judge Alison McKenna  
Tribunal Member Rosalind Tatam  
Tribunal Member Emma Yates

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**THOMAS FOSTER**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondents**

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**DECISION**

35 1. The appeal is dismissed.

## REASONS

### *Mode of Hearing*

3. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules<sup>1</sup>.
4. The Tribunal considered an agreed open bundle of evidence comprising 101 pages. It also considered a closed bundle comprising 19 pages.

### *Background to Appeal*

2. The Appellant made an information request to Braintree District Council on 29 January 2023 in the following terms:

*Please could you let me see a copy of Counsel's advice to Braintree District Council in which counsel assessed the merits of the Council's case in defending the planning appeal by Berkley Projects (Kelvedon) LLP against the refusal of outline planning permission for 300 houses and other facilities to the north of London Road Kelvedon (ref 17/00679/OUT).*

3. On 21 February 2023 Braintree District Council refused the request in reliance upon regulation 12 (5) (b) of the Environmental Information Regulations 2004 ('EIRs')<sup>2</sup>. This position was upheld following an internal review and communicated to the Appellant on 24 April 2023. The Appellant complained to the Information Commissioner.
4. The Information Commissioner issued Decision Notice on 11 July 2023, upholding the District Council's stance and requiring no steps to be taken. The Appellant appealed to the Tribunal.

### *The Decision Notice*

5. The Decision Notice noted that the Council had refused the relevant planning application notwithstanding the fact that officers had recommended its approval. It found that, following receipt of counsel's advice, the Council did not defend the appeal.
6. The Decision Notice found that the advice requested was subject to legal professional privilege of both the 'advice' kind and the 'litigation' kind so that regulation 12 (5) (b) EIRs was engaged. Although the appeal hearing had concluded (undefended by the Council) by the time the information request was made and refused, the decision had not yet been promulgated. The Decision Notice set out the law in relation to legal professional privilege and noted that the public interest balancing exercise must take account not only of the circumstances of this case but also the benefit to society of privileged advice remaining confidential.

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<sup>1</sup><https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

<sup>2</sup> [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukreg/2004/1200)

7. The Decision Notice noted that there is a presumption of disclosure under the EIRs and there is an acknowledged public interest in transparency; also that the Council's claim to 'litigation' privilege was weakened by the planning appeal hearing having concluded; nevertheless, the public interest in maintaining the exception was stronger in view of the 'advice' privilege and the public interest in maintaining legal professional privilege more generally.

*The Law*

8. Regulation 12 of the EIRs provides (where relevant) as follows:
- 12(1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*
- (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.*
- (2) *A public authority shall apply a presumption in favour of disclosure.*

9. Regulation 12 (5) (b) of the EIRs 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, 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;*

10. The powers of the Tribunal in determining this appeal are set out in Regulation 18 EIRs and s.58 of the Freedom of Information Act 2000, as follows:

*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.*

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

11. 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. The relevant standard of proof is the balance of probabilities.

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### *Submissions and Evidence*

12. The Appellant's Notice of Appeal dated 3 September 2023 did not dispute that the EIRs were the appropriate regime for the consideration of his request. His grounds of appeal were that the Decision Notice was erroneous because (i) legal professional privilege had already been waived by the District Council because an officer had referred to the advice in correspondence; (ii) the proceedings to which the legal advice related were no longer live so that litigation privilege could not apply; (iii) the advice was of no use to other cases so that advice privilege did not apply; (iv) regulation 12 (5) (b) EIRs was not engaged.
13. The Respondent's Response dated 13 October 2023 maintained his analysis as set out in the Decision Notice. In response to the grounds of appeal it was submitted that the privilege had not been waived in correspondence and further that in all the circumstances the public interest favours withholding the requested information and maintaining the principle of legal professional privilege.
14. The Appellant did not file a Reply.
15. The Respondent provided us with a closed bundle of evidence, which we 'gist' for the benefit of the Appellant as follows. This consisted of the requested information itself and of the unredacted correspondence between Braintree District Council and the Respondent, which was revelatory of the withheld information. We have not found it necessary to refer to this in a closed annexe to this Decision.

### *Conclusion*

16. We find that the Decision Notice correctly cites the law as to Legal Professional Privilege.
17. We note that there was indeed a reference to the legal advice in correspondence, but we do not find that this constituted a waiver of privilege in law. There is a partial reference to it which, having seen the Closed Bundle, we concur did not reveal its substance; further, the privilege belongs to the District Council corporately and it has not been shown by the Appellant that the member of staff concerned had authority to waive privilege on behalf of the Council.
18. We accept that the 'litigation' privilege point is weakened by the fact that the planning hearing had already taken place by the time the District Council refused the Appellant's information request, and (unusually) the result was known before promulgation because the Council had not defended the appeal. On balance, we would not have found that the advice attracted litigation privilege; however, having read the advice for ourselves, we do find that it attracts 'advice' privilege and so agree with the Decision Notice that it was excepted from disclosure.
19. Having considered the matter carefully, we conclude that the Decision Notice was correct to find that regulation 12 (5) (b) of the EIRs was engaged by the Appellant's request and that the public interest favoured withholding the information requested. Accordingly, we discern no error in the Decision Notice and now dismiss this appeal.

**(Signed)**

**JUDGE Alison McKenna**

**DATE: 17 January 2024**

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