



NCN: [2024] UKFTT 00878 (GRC)

Case Reference: EA/2023/0265

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

**Heard : Determined on the papers
26 March 2024
Decision given on: 30 September 2024**

Before

**TRIBUNAL JUDGE JACQUELINE FINDLAY
TRIBUNAL MEMBER SUZANNE COSGRAVE
TRIBUNAL MEMBER MARION SAUNDERS**

Between

RUNE DYBEDAL

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

CHIEF CONSTABLE OF NORTHUMBRIA POLICE

Second Respondent

Decision

The appeal is Dismissed.

REASONS

Background and Request

1. This appeal is brought under section 57 of the Freedom of Information Act 2000 (FOIA) against the Decision Notice (DN) of the Information Commissioner (the Commissioner) dated 24 April 2023 with reference IC-212251-L5L7 which is a matter of public record.
2. The parties opted for a paper determination of the appeal. The Tribunal was satisfied that it could 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 (the Rules).
3. In reaching its decision the Tribunal took into account all the evidence before it in an agreed Open Bundle (OB) and a Closed Bundle (CB) and made findings on the balance of probabilities.
4. A case management order was made on 27 February 2024 by Judge Buckley who ordered that the permitted redactions were those that were necessary to prevent the purpose of the proceedings being defeated by revealing the nature of content of the withheld information. The entire CB is covered by the rule 14 of the Rules order. The CB contains only the withheld legal advice. There is nothing else in the CB.

5. The full details of the background to this appeal, Mr Dybedal's FOIA request for information (the Request) and the Commissioner's decision are set out in the DN.

6. On 20 November 2022, Mr Dybedal made the Request to the Northumbria Police in the following terms:

"In 2018 we reported to Northumbria Police serious criminal fraud by false representation involving the HM Land Registry, Tribunals and the Court of Appeal which has now been dismissed as a civil issue under reference to a legal opinion said to be produced by an independent barrister. Under reference to the Freedom Of Information Act, we demand that Northumbria Police disclose the advice you base your decision on. In fact, if the barrister's review does support Northumbria Police's decision, there is no reason not to disclose the advice to justify your decision. Failure to disclose the advice used to the detriments of victims of crime, will be considered as an attempt to hide misconduct in Northumbria Police which will be a public issue."

7. Northumbria Police responded on 5 December 2022 stating that it was relying on section 40(5) FOIA and would therefore neither confirm nor deny if it held the requested information.

8. Following an internal review, Northumbria Police wrote to Mr Dybedal on 16 January 2023 stating that it was upholding its original decision.

9. Mr Dybedal contacted the Commissioner on 22 January 2023 to complain about the way his Request for information had been handled.

10. During the Commissioner's investigation, Northumbria Police accepted that it held the information but advised that it now sought to rely on section 42(1) FOIA to withhold it.
11. The Commissioner considered that the scope of his investigation was to determine whether Northumbria Police was entitled to rely on section 42(1) FOIA, when refusing the Request.

The Decision Notice

12. On 24 April 2023 the Commissioner issued the DN which stated that Northumbria Police had correctly relied on section 42(1) FOIA when refusing the Request. The Commissioner's decision was that Northumbria Police breached section 10(1) and section 17(1) of FOIA as it failed to confirm or deny whether the requested information was held and failed to provide an appropriate refusal notice within 20 working days. The Commissioner did not require further steps to be taken.

Legal Framework

13. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information under section 1(1)(a) of the FOIA and to have that information communicated to him if the public authority holds it under section 1(1)(b) of the FOIA.
14. This right is subject to exemptions set out in Part II of FOIA. Section 42(1) FOIA provides that:

“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.”

15. Section 42 FOIA is a qualified exemption to disclosure as it is not listed as an absolute exemption in section 2(3) FOIA and is therefore subject to the public interest test under section 2(2)(b) FOIA. This states that a public authority does not have to provide the information if “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Grounds of Appeal

16. Mr Dybedal submits the following grounds of appeal:
 - a) The Northumbria Police is a public body who have used public funds to obtain legal advice but will not make the same available to the public and victims of crime they are supposed to protect.
 - b) Northumbria Police is a neutral public body who is obliged to protect victims against crime and should therefore not hide behind an undisclosed legal opinion to avoid investigating a serious crime.
 - c) He agrees to public disclosure if necessary by removing personal information and is prepared to accept restricted disclosure.
 - d) Legal professional privilege (LPP) is designed to protect a party from prejudicing its position. However, Northumbria Police is not a party to the crime reported, which is an issue between the victim of the crime and

offenders. Northumbria Police have a duty to be neutral and transparent to both the victim and the offender and a duty to investigate any complaint fairly. Holding back information is misleading and may amount to misconduct by Northumbria Police. Only disclosure of the advice will reveal whether all relevant information has been provided by Northumbria Police and all the issues addressed in his complaint to Northumbria Police have been considered.

- e) The legal opinion is a review of his complaint of a serious crime of fraud where he is one of the victims. The Northumbria Police have therefore no valid reason for protecting their position or refusing to disclose the review of the complaint by the Appellant filed with the police for investigation.
- f) The Appellant assumes that the reluctance to disclose the legal review of the reported crime means that the review does not actually support Northumbria Police's desire to avoid investigating serious crime of fraud committed towards the HM Land Registry, Tribunals and the Court of Appeal. His Request was made to prevent fraud being committed towards these vital institutions of justice.
- g) To use LLP in this way is contrary to the purpose of the LPP which is to protect individuals from prejudicing their position.
- h) No civil litigation against the police has taken place or will ever take place in respect of this matter. Consequently, litigation privilege does not apply.
- i) The principle that a person must be able to consult his lawyer in confidence because otherwise he might hold back half the truth does not apply to

Northumbria Police because it is meant to be a neutral public body with an obligation to investigate crimes by illuminating all relevant facts. Northumbria Police have a duty to consider all information and therefore no reason to hold back any information. If Northumbria Police are holding back information, the police may be guilty of misconduct.

- j) No case law has been referred to which supports the proposition that Northumbria Police have any reason to protect the advice received from a barrister in respect of a crime reported to them. Northumbria Police is supposed to be neutral body without any party to protect, transparency should be expected in particular in relations to victims of crime.
- k) All the case law quoted by the Commissioner refers to cases where individual interests can be prejudiced. By applying a LPP to advice given to the police, the police are allowed to hide behind a legal advice which appears to be seriously flawed when criminal fraud by misrepresentation is referred to as a civil matter only. Under section 2 of the Fraud Act 2006 it will be in the public interest to disclose how fraud by misrepresentation can be a civil matter only. This will set a sad precedence that fraud by misrepresentation involving the HM Land Registry, Tribunals and the Court of Appeal will not be a crime. Failure to disclose the opinion explaining the rationale will also weaken the confidence of public bodies and their advisers in the efficacy of the system of LPP.
- l) The Appellant points out that the ICO guidelines on public interest states that if there is a plausible suspicion of wrongdoing, this may create a public interest in disclosure. Even where this is not the case, there is a public interest in releasing information to provide a full picture. The alleged wrongdoing must

be plausible and does not have to be proved.. There only needs to be prima facie evidence.

- m) There is a public interest in transparency and accountability, to promote public understanding and to safeguard the democratic process, good decision-making by public bodies, upholding standards of integrity, ensuring justice and fair treatment for all and securing the best use of public resources.
- n) The ICO guidelines (no 23) provides that the LPP does not cover communication to further a criminal purpose i.e. to enable a client to commit a crime.
- o) When a barrister is quoted to advise the police that proven criminal fraud by misrepresentation involving the HM Land Registry, Tribunals and Court of Appeal, is a civil matter only without any criminal wrongdoing whatsoever, the police are enabled to pervert the course of criminal justice, conceal a crime of fraud as a civil matter and assisting offenders gaining from their crimes by not making the fraudsters responsible for their crimes.
- p) Ignorance of the law or hiding behind an undisclosed legal advice is a poor legal defence for senior police officers.
- q) A barrister who advises his police client that fraud is a civil matter only is with respect incompetent to advise on the basic understanding of fraud as defined in Section 2 of the Fraud Act 2006. Alternatively, the barrister has a different agenda to pervert the course of criminal justice which is a crime in itself and should therefore not be protected by the LPP even if disclosure of the barrister's review is likely to be a public embarrassment. People in general know that fraud is a serious crime.

- r) The legal opinion received from the barrister should be disclosed to explain the rationale behind the police's decision to consider criminal fraud as a civil matter only.
- s) The barrister on behalf of the Chief Constable also seeks to dismiss the CPS which is a legal adviser to the police. This is contrary to normal police practice as only the CPS can test and prosecute a crime.
- t) It is not normal for the police to instruct counsel directly without involving the CPS. A serious fraud case involving HM Land Registry, Tribunals and the Court of Appeal warrants involvement of the CPS for advice.
- u) The identity of the barrister has not been confirmed to check the barrister's independence.
- v) The Appellant requests disclosure of the barrister's advice to Northumbria Police to support their decision to dismiss his complaint of proven serious crimes of fraud involving the HM Land Registry, Tribunals, and the Court of Appeal where he is the ultimate victim.
- w) If this appealed is dismissed, it will be for the media to make it public that fraud is only a civil issue with no criminal consequences as confirmed by Northumbria Police under reference to an undisclosed advice from a barrister.

The Commissioner's Response

17. The Commissioner submits the following points:

- a) The Commissioner remains satisfied that the requested information is legal advice provided to the Police and therefore falls squarely within the bounds of legal advice privilege. There is no evidence that the privilege has been waived. As such the Commissioner is satisfied that the exemption provided by section 42(1) of the FOIA is engaged in relation to this information.
- b) Even if the legal advice was obtained using public funds this does not mean that the legal advice is not privileged.
- c) LPP applies to all confidential communications between the lawyer, acting in his professional capacity, and the client where legal advice is sought or given. It is a fundamental condition that a man must be able to consult his lawyer in confidence since otherwise he may hold back half the truth.
- d) Mr Dybedal's arguments appear to misunderstand that disclosure under FOIA is disclosure to the world at large.
- e) At common law, LPP is (with a very few exceptions), regarded as absolute. Our law recognises the great importance of a person being able to obtain informed legal advice in confidence.
- f) One consequence of this is that legally privileged information may even be withheld from a Court. Numerous cases of the very highest authority recognise the importance of LPP. In *R v Derby Magistrates ex parte P* [1996] 1 AC 487, 507, Lord Taylor described LPP as 'a fundamental condition on which the administration of justice as a whole rests'.
- g) In *R (Morgan Grenfell) v Special Commissioners* [2003] 1 AC 563, 606-7 Lord Hoffmann said that LPP was a 'fundamental human right' and that 'such advice

cannot be effectively 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’.

- h) There is a strong, inherent public interest to maintaining the section 42 exemption wherever it is engaged. The public interest factors that underpin the doctrine of LPP – that parties should be able to consult their legal advisers in confidence so that they feel able to set out their position with complete candour – will always weigh strongly in the balance whenever section 42 is engaged. It is imperative that a public authority be able “to obtain free and frank advice and give full information to its advisers including matters which would otherwise adversely affect the public authority’s position” (James Kessler QC v IC EA/2007/0043 par 76-77).
- i) Parliament has chosen to make the section 42 exemption a qualified one, the inherent weight of the exemption cannot operate as an automatic bar to disclosure. Instead, the Tribunal, in a long line of cases has structured its approach to the public interest test for section 42 information in the same way as for other exemptions but given particular weight to the public interest in maintaining the exemption.
- j) In *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023) (Bellamy) at paragraph 35 the FTT stated that there is “a strong element of public interest inbuilt into the privilege itself” and that “at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and

obligations with those advising them without fear of intrusion, save in the most clear case...”.

- k) The Tribunal’s approach in Bellamy was endorsed by the High Court in *DBERR v O’Brien v IC*, [2009] EWHC 164 QB, (DBERR) which held that section 42 cases “are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in questionThe in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight.”
- l) Considerable weight should also be attributed to the decision of the three judge panel of the Upper Tribunal in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (DCLG). Whilst this was a decision concerning the application of regulation 12(5)(b) EIR, the Upper Tribunal found that the significance of LPP in relation to the public interest test is broadly the same as section 42 [55]. The UT in DCLG underlined the importance of the system of LPP to a fair and proper judicial process. The Upper Tribunal considered in DCLG that weight should be attributed not only to the need to maintain LPP in that case but also to the more generalised risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of the system of LPP.
- m) In *Savic v IC, AGO & CO* [2017] UKUT AACR 26, the Upper Tribunal agreed with the long-standing case law that identified powerful public interest factors served by the exemption and found that the balance will be more likely to favour nondisclosure where the information “is relevant to, or might be or

might have been of use in, existing, concluded or contemplated legal proceedings.”

- n) The Court in DBERR also held that it will be an error of law if the Tribunal fails to give significant weight to the inherent interest in non-disclosure.
- o) The Tribunal in the Bellamy case further took the view that it was for the Appellant to adduce sufficient consideration which would demonstrate that the public interest in maintaining the exemption is, in the particular case, outweighed by any public interest in justifying a disclosure.
- p) This has been supported in subsequent decisions including *Gillingham v Information Commissioner* (EA/2007/0028) in which it was stated that “For the public interest in maintaining LPP not to outweigh the public interest in disclosure, the public interest needs to be particularly strong, because proportionate reasons are required for not upholding a fundamental human right.”
- q) The balance of public interest lies in withholding the information and protecting the Police’s ability to obtain legal advice without the fear of premature disclosure.
- r) The public interest factors advanced by Mr Dybedal both during the Commissioner’s investigation and on appeal are insufficient to outweigh the very strong inbuilt public interest in maintaining the section 42(1) FOIA exemption.
- s) The appeal should be dismissed.

Conclusions

18. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal applied the legislation and case law as set out above.
19. The Tribunal found that Northumbria Police correctly applied section 42(1) FOIA - LPP which includes confidential communications between client and lawyer made for the dominant purpose of seeking or giving legal advice.
20. The Tribunal found that the balance of public interest lies in withholding the information and protecting Northumbria Police's ability to obtain free and frank legal advice without fear of disclosure.
21. The Tribunal found that there are no public interest arguments that are enough to outweigh or override the inbuilt public interest in the advice remaining protected by LPP and the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure.
22. Legal advice privilege protects all confidential communications between the lawyer, acting in his professional capacity, and the client where legal advice is sought or given and where the lawyer is acting in a 'relevant legal context' (per Lord Scott at para 38 in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 (Three Rivers (No 6)) following *Balabel Air v Air India* [1988] Ch 317 (Balabel).
23. In *Three Rivers (No 6)* the House of Lords rejected the Court of Appeal's view that advice privilege is restricted to advising clients about their legal rights and obligations, preferring the judgement of Taylor LJ in *Balabel* at page 330,

where he describes legal professional privilege as involving: “a continuum of communication and meetings between solicitor and client Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.”

24. Legal advice privilege covers confidential communications between a lawyer and client for the purpose of giving or obtaining legal advice or assistance. That is the situation in this case.
25. The Tribunal found that the advice was provided by a barrister engaged to give such advice.
26. The Tribunal took into account that Northumbria Police is not an individual but a public body. In this regard the Tribunal had regard to the leading authority of *Three Rivers District Council v Bank of England (No.5)* [2003] EWCA Civ 374 where in the context of the preparation of the Bank of England’s evidence to a judicial inquiry, for which it had engaged lawyers, the Court of Appeal held that the client was not the Bank of England as a whole, but rather the unit within the Bank ‘established to deal with inquiries and to seek and receive [...] advice’.
27. In reaching its decision the Tribunal has noted that legal advice ‘is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in a relevant legal context’. However, it does not extend to everything done by a lawyer for a client: the question must reasonably require the special professional skills and knowledge of a lawyer (*Three Rivers (No 6)*). Privilege extends beyond communications in the strict sense to documents created for the purpose of giving or receiving legal advice or assistance, or which reveal the content of lawyer client-communications. Legal advice privilege also attaches to all the material forming part of the continuum

of lawyer/client communications even if each communication does not expressly seek or convey legal advice (Balabel).

28. The Tribunal has borne in mind that litigation privilege relates to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Litigation privilege can only be relied upon in circumstances where the following criteria are met:-
 - i) Where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility.
 - ii) The dominant purpose of the communications must be to obtain advice to assist in the litigation; and
 - iii) The communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
29. The Tribunal has borne in mind that the underlying rationale for litigation privilege is broader than that of legal advice privilege. It is not based solely on the need to protect client-lawyer communications but extends protection to the process of gathering factual information in preparation for litigation.
30. In relation to enclosures or documents attached to communications with a lawyer such enclosures or attachments are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. If an enclosure existed before litigation was contemplated or before it was considered possible that legal advice might be needed, LPP will not usually

apply to it. There is, however one important exception to this rule. When a lawyer uses their skill and judgement to select pre-existing documents that weren't already held by the client, for the purposes of advising their client or preparing for litigation, then LPP can apply.

31. The Tribunal found that the requested information is legal advice provided to Northumbria Police and comes within LPP. The privilege has not been waived. The information within the scope of the Request is confidential legal advice provided by a barrister, a qualified legal adviser to their client, Northumbria Police.
32. The legal advice was obtained using public funds but this does not prevent it being privileged.
33. None of the points raised by Mr Dybedal support his assertion that the advice is not legal advice provided to Northumbria Police by a qualified legal adviser. In particular, the CPS are not legal advisers to the Police. It is the responsibility of solicitors and barristers employed by Northumbria Police to provide legal advice.
34. Mr Dybedal misunderstands the meaning of disclosure in believing that there is a statutory route for information to be disclosed just to him and not the world.
35. In relation to the public interest test the Tribunal found that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
36. In reaching its decision the Tribunal has borne in mind the review by the Upper Tribunal of the case law under section 42 and the public interest test

under s.2(2)(b) in *Callender Smith v IC and the Crown Prosecution Service* [2022] UKUT 60 (AAC) which summarised the operation of the public interest test:

“18. ... s.42 is a qualified exemption which means that in addition to demonstrating that the requested information falls within the definition of the exemption, there must be consideration of the public interest arguments for and against disclosure to demonstrate in a given case that the public interest rests in maintaining the exemption or disclosing the information. When applying the public interest test the approach to be taken is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: s2(2)(b) FOIA.”

37. The Tribunal found that the exemption in section 42 carries “inherent weight” in the public interest balance. In reaching its decision the Tribunal has borne in mind the judgment in DBERR where it was decided that section 42 cases are different because the in-built public interest in non-disclosure carries significant weight and significant weight should be attached to public interests against disclosure being in-built into LPP and it is not necessary to demonstrate any specific prejudice or harm from disclosure of the document.

38. The Tribunal has borne in mind the explanation of the Upper Tribunal for the rationale for the inherent weight in DCLG when quoting the judgment of Lord Taylor CJ in *R v Derby Magistrates Court ex parte B* [1996] AC 487, at 507Dff, who said:

“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.”

39. The Tribunal found that LPP as a fundamental condition of the administration of justice means that even if there is no public interest prejudice which can be identified there is an inherent prejudice that has to be accounted for in the public interest balance as weighing in favour of maintaining the exemption as directed by the Upper Tribunal in *Cabinet Office v Information Commissioner* [2014] UKUT 461 (AAC).
40. The Tribunal found there are no public interest factors in favour of disclosure that are not outweighed by the inherent weight of exemption.
41. Despite this inherent weight, however, the exemption is not an absolute one. There may be public interest factors in a given case in favour of disclosure that are not outweighed by the inherent weight of exemption, as the Upper Tribunal explained in *Savic v IC and Attorney General* [2016] UKUT 534 (AAC).
42. The Tribunal found that the principle that parties should be able to consult their legal advisers in confidence in order that they are able to set out their position with complete candour weighs strongly in maintaining the section 42 exemption.

43. The Tribunal found it important for Northumbria Police to be able to obtain full and frank advice and provide full information to its advisers and this weighs strongly in favour of the exemption in the public interest balancing exercise.
44. The Tribunal found that a public authority should be allowed to conduct a full and frank exchange of views in relation to their legal position with their legal advisers without fear of disclosure to the public.
45. The Tribunal was not persuaded that any of Mr Dybedal's submissions demonstrate that the public interest in maintaining the exemption is outweighed by any public interest in justifying disclosure.
46. Mr Dybedal has requested the identity of the barrister in order to confirm their independence. It is the view of the Tribunal that this disclosure is not necessary or appropriate in view of its decision.
47. Mr Dybedal's assertion that there is public interest in transparency and accountability, to promote public understanding and to safeguard the democratic process, good decision-making by public bodies, upholding standards of integrity, ensuring justice and fair treatment for all and securing the best use of public resources. This assertion does not outweigh the public interest in maintaining the exemption.
48. Mr Dybedal asserts that there is potential public interest in transparency where there is a suspicion of wrongdoing. The Tribunal was not persuaded that there was prima facie evidence of any wrongdoing and no weight can be attached to this argument.

49. The Tribunal found that none of the arguments and grounds presented by Mr Dybedal identify any error of law in the DN nor do they identify any incorrect exercise of the Commissioner's discretion.
50. Accordingly, the appeal is dismissed.

Signed: **Judge J Findlay**

Date: 30 September 2024