



Case Reference: FT-EA-2024-0234
Neutral Citation Number: [2025] UKFTT 287 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Decided without a hearing
Decision given on date: 7 March 2025

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER DR PHEBE MANN
TRIBUNAL MEMBER MIRIAM SCOTT

Between

GAIL JUDSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision:

1. The appeal is dismissed.

REASONS

Introduction

1. The parties and the tribunal agreed that this appeal was suitable for determination on the papers.

2. This is an appeal against the Commissioner's decision notice IC-290266-L5S0 of 21 May 2024 which held that Redcar and Cleveland Borough Council ('the Council') was entitled to rely on regulation 12(5)(b) of the Environmental Information Regulations 2004 (EIR) (adverse effect on the course of justice) to withhold the information.

Factual background to the appeal

3. This background to the request for information in this appeal is the question of the Council's legal obligations in relation to a piece of land in Guisborough owned by the Council known as the King George V Playing Fields, part of which is leased to Guisborough Town Football Club.

Request and response

4. Ms. Judson made the following request to the Council on 8 November 2023:

"... it is evident that there remains an unresolved issue of high importance relating to Redcar and Cleveland Council's legal obligations to the public and Fields in Trust, in respect of King George V Playing Field, Guisborough.

...

... I am writing to request the legal advice/information that the Council have received and are relying legal relying upon to maintain their stance that there are no legal obligations."

5. The Council replied on 5 December 2023. The Council withheld the information under regulation 12(5)(b) EIR (adverse effect on the course of justice) on that basis that the advice was subject to legal advice privilege and the public interest favoured maintaining the exception.

Decision notice

6. In a decision notice dated 21 May 2024 the Commissioner concluded that the Council was correct to withhold the requested information under regulation 12(5)(b), but that it failed to complete an internal review in time and breached regulation 11(4).
7. The Commissioner was satisfied that the requested information was subject to legal advice privilege.
8. The Commissioner considered that disclosure of the withheld information would more likely than not adversely affect the course of justice, because it would involve public access to privileged information when the matters to which the information relate were still 'live'. The Commissioner considered that disclosure of the advice would provide an indication of the arguments, strengths or weaknesses which the

Council might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out.

9. The Commissioner referred to the decision of the Upper Tribunal in **DCLG v Information Commissioner & WR** [2012] UKUT 103 which confirmed that in considering whether information subject to LPP engaged the exception, it was relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on the particular case.
10. The Commissioner was therefore satisfied that disclosure of the requested information would result in adverse effects to the course of justice.
11. The Commissioner concluded that the arguments in favour of disclosure did not carry significant, specific weight and determined that, in the circumstances of this particular case they were outweighed by the arguments in favour of maintaining the exception.

Grounds of Appeal

12. The Grounds of Appeal are in essence:
 - 12.1. The Commissioner was wrong to hold that disclosure would adversely affect the course of justice and/or
 - 12.2. The Commissioner was wrong to hold that the public interest favours maintaining the exception.

The Commissioner's response

13. The Commissioner noted that he concluded in the decision notice that legal advice privilege, not litigation privilege applied and maintained his position that disclosure would adversely affect the interests of justice.
14. In relation to the public interest the Commissioner acknowledged that there was an explicit presumption in favour of disclosure under EIR but submitted that the risk of disclosure leading to a weakening of confidence in the general principle of legal professional privilege was a public interest factor of very considerable weight.
15. The commissioner submitted that the previous decision in EA/2022/0427 referred to by the appellant did not assist in determining this appeal.

The appellant's reply

16. The appellant made some corrections to the timeline in the Commissioner's response.

Legal framework

17. As the Court of Justice of the European Union (“CJEU”) has said:

“The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal”. (**Office for Communications v Information Commissioner Case C-71/10** at paragraph 22).

18. This is why the EIR is deliberately different from the Freedom of Information Act 2000 (“FOIA”) in that all exceptions are subject to a public interest test and there is a presumption in favour of disclosure.

19. The EIR do not contain an express obligation to interpret grounds for refusal in a restrictive way, but, given the obligation to interpret the EIR purposively in accordance with the Directive the overall result in practice ought to be the same: the grounds for refusal under the EIRs should be interpreted in a restrictive way (**Vesco v (1) Information Commissioner and (2) Government Legal Department** [2019] UKUT 247 (TCC))

20. A three-stage test applies, on the wording of regulation 12:

1. Would disclosure adversely affect the course of justice? (regulation 12(5)(b))
2. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (regulation 12(1)(b))
3. Does the presumption in favour of disclosure mean that the information should be disclosed? (regulation 12(2))

21. The public interest test requires us to analyse the public interest. The starting point is the content of the information in question, and it is relevant to consider what specific harm might result from the disclosure (**Export Credits Guarantee Department v Friends of the Earth** [2008] EWHC 638 paragraphs 26-28). The public interest (or various interests) in disclosing and in withholding the information should be identified; these are “the values, policies and so on that give the public interests their significance” (**O’Hanlon v Information Commissioner** [2019] UKUT 34 at paragraph 15). “Which factors are relevant to determining what is in the public interest in any given case are usually wide and various”, and will be informed by the statutory context (**Willow v Information Commissioner and the Ministry of Justice** [2018] AACR 7 paragraph 48)

22. Legal professional privilege comprises two limbs, legal advice privilege and ‘litigation privilege’. We are concerned in this appeal with legal advice privilege:

confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance.

23. The rationale behind the principle of legal advice privilege is set out in the Supreme Court's decision in Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6) [2004] UKHL 48 ('Three Rivers (No 6)') at paragraph 34. After summarising the relevant authorities, Lord Scott said:

None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of Zuckerman's Civil Procedure (2003) where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.

24. It has been recognised in cases under the Freedom of Information Act 2000 (FOIA) that there is a significant 'in-built' interest in the maintenance of legal professional privilege (DBERR v O'Brien and Information Commissioner [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. This principle applies equally in EIR cases.

25. The statutory context includes the backdrop of the Directive and Aarhus discussed above and the policy behind transparency of environmental information. Once the public interests in disclosing and withholding the information have been identified, then a balancing exercise must be carried out. If the public interest in disclosing is stronger than the public interest in withholding the information, then the information should be disclosed.
26. If application of the first two stages has not resulted in disclosure, we must go on to consider the presumption in favour of disclosure under regulation 12(2) of the EIRs. It was “common ground” in the case of *Export Credits Guarantee Department v Friends of the Earth* [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.

The Task of the Tribunal

27. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

28. The issues we have to determine are:
 - 28.1. Would disclosure of the withheld information adversely affect the course of justice?
 - 28.2. In all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
 - 28.3. Does the presumption in favour of disclosure mean that the information should be disclosed?

Evidence

29. We have read an open and a closed bundle of documents, which we have taken account of where relevant.
30. The closed bundle contains the withheld information. The tribunal is satisfied that it is necessary to withhold that information from the appellant and that it is not possible to reveal any further information about the content of the closed bundle otherwise the purpose of the proceedings would be defeated.

Discussion and conclusions

31. We agree that the EIR is the appropriate regime on the basis that the requested information is environmental information for the purposes of the EIR.

Would disclosure adversely affect the course of justice?

32. The information in the closed bundle is withheld on the basis that it is covered by legal advice privilege, because disclosure of privileged documents would adversely affect the court of justice.

33. Legal advice privilege covers confidential communications between lawyer and client for the purpose of giving or receiving legal advice or related legal assistance. They do not need to be made for the purpose of intended or impending litigation. There is no need for there to be any threat or likelihood of litigation for legal advice privilege to apply.

34. We have reviewed the withheld information in the closed bundle. The withheld information falls squarely within the definition of legal advice privilege.

35. We accept that the disclosure of documents that are the subject of legal advice privilege would adversely affect the course of justice. The principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, is fundamental to the administration of justice.

Does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

36. There is always a strong in-built public interest in maintaining the principle of legal professional privilege. This is so even where there is no 'live' legal dispute. It applies to advice covered by litigation privilege and legal advice privilege. That is because disclosure undermines the principle of legal professional privilege which is fundamental to the legal system and the course of justice.

37. There would be an even stronger public interest in maintaining the exception where the matter to which the advice relates was 'live' at the relevant date. In our view the matter can be described as 'live'. We note the following statement by the appellant in the notice of appeal, which suggests that there remained, at the relevant time, a risk of future litigation:

“... if the withheld legal advice does prove the Council’s stance in relation to their legal obligations of the land in question, then there would be no need of me to proceed with any litigation as the matter would be resolved.”

38. The appellant submits that it is illogical for the Council to rely on the risk of future litigation, because, as the extract above shows, she argues that if the legal advice proved the Council’s stance in relation to the land litigation would not be required because the matter would be “resolved”.

39. Legal advice from an individual barrister or a solicitor is not a definitive statement of the law. It merely represents that barrister's or that solicitor's expert opinion on the particular legal question asked and on the particular facts provided by the client. It cannot 'resolve' a dispute as to the legal status of the land. Legal advice cannot 'prove' that the Council is right (or wrong) in its view of the legal position. The true legal position can only be definitively determined by a court or tribunal.
40. It is possible that an individual considering litigation might be persuaded not to take any further action upon reading the legal advice provided to their opponent, but they might equally disagree with the advice, or the facts upon which that advice was based, or the interpretation of the statutes or any number of other issues.
41. For those reasons we consider that there remained a risk of litigation at the relevant date and that the matter was still 'live'. This increases the already weighty public interest in maintaining the exception.
42. We accept that there is a public interest in disclosure. There is a public interest in transparency and in the public understanding the decision-making process. We accept that there is a specific increased public interest in this case because of the public interest in ensuring that public recreational and open spaces remain available for the benefit of the public. We accept that this is of particular importance in this area for the reasons outlined by the appellant. We accept that the presumption in favour of disclosure of environment information and the statutory context of the EIR referred to above add further to the public interest in disclosure. On this basis we accept that there is a significant public interest in disclosure.
43. Even if the matter had not been live, we would have been satisfied that the significant public interest in disclosure was substantially outweighed by the weighty public interest in not undermining the principle of legal advice privilege. As we have concluded that the matter was live at the relevant date the balance comes down even more strongly in favour of maintaining the exception.
44. In our view, the interests are not equally balanced and therefore the presumption in favour of disclosure under EIR does not operate to tip the scales in favour of disclosure.
45. For those reasons the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 14 February 2025