



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2010/0184

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50326593
Dated: 9 September 2010**

Appellant: JOHN SKINNER

Respondent: INFORMATION COMMISSIONER

Second Respondent: NORTH SOMERSET COUNCIL

On the papers on 4 February 2011

Date of decision: 1 March 2011

Before

Robin Callender Smith
Judge

and

Mike Jones
John Randall
Tribunal Members

Representations:

For the Appellant: Mr John Skinner submitted his own written representations

For the Respondent: Ms Claire Nicholson

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0184

Subject matter:

Environmental Information Regulations 2004

Exceptions, Regs 12 (4) and (5)

- Legal professional privilege (5) (b)

Cases: *Malcolm Kirkcaldie v Information Commissioner & Thanet District Council (EEA/2006/001)* and *Rudd v Information Commissioner and the Verderers of the New Forest (EA/2008/0020)*.

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0184

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 9 September 2010 and dismisses the appeal.

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0184

REASONS FOR DECISION

Introduction

1. Mr John Skinner ("the Appellant") wanted a copy of the legal advice obtained by the North Somerset Council ("the Council") in relation to a complaint he had made to the Council about an alleged breach of planning control at a residential property close to his own. At issue were regulations in relation decking.
2. Earlier, in June 2009, the Appellant had contacted the Council with a complaint about an alleged breach of planning control at the neighbouring property. In July 2009 the Council wrote to him with its view that there had been no breach of planning control the Council stated it would not be taking any further action in relation to the complaint and it considered the matter closed.

The request for information

3. On 22 October 2009 the Appellant made the following request to the Council:

"I am writing to you to request information held by the Council on myself, my property and the property directly adjacent to me at [property address]."

4. The Council responded on 7 December 2009 by disclosing some information but withholding other information under the provisions of regulation 13 and 12 (5) (f) of the Environmental Information Regulations ("EIR").

5. There was further correspondence and an internal review was conducted by the Council into its handling of the request for information. On 22 January 2010 the Appellant e-mailed the Council's chief executive asking for a list of information that had been withheld. The Appellant specifically asked for disclosure of the "*legal advice provided by the Council's solicitors*" that he understood formed the basis of the Council's decision not to take enforcement action.
6. The Council responded on 12 February 2010 and stated that it did hold the legal opinion that related to the alleged breach of planning control raised by the Appellant but that it considered it to be exempt by virtue of section 31 and 42 of the Freedom of Information Act 2000 ("FOIA").
7. The Appellant was not satisfied with that decision and on 22 February 2010 the Council informed him that it would be willing to hold further discussions with his solicitor. It did not appear to have conducted an internal review of its decision to withhold the legal advice requested on 22 January 2010.

The complaint to the Information Commissioner

8. On 12 March 2010 the Appellant contacted the Information Commissioner ("the IC") to complain about the way his request for information had been handled. He asked the IC to consider the following points:
 - The complaint that he raised with the Council related to a planning matter and "in the interest of openness and transparency local authority should be clear in their dealings and provide clear, unambiguous explanations with legal advice, if taken, to explain how a decision was made".
 - He asked the IC to secure disclosure of the "legal advice on this planning matter which they [the Council] obtained from their solicitors on 3 October 2009".
9. Although the Appellant original request of 22 October 2009 was for information that would have included his own personal data and the data

of the owners of the neighbouring property, the Appellant made it clear that he was now only concerned with the legal advice obtained by the Council.

10. On 24 May 2010 the Council provided the IC with a copy of the withheld legal advice and clarification of its position on it.
11. The Council had dealt with the Appellant's request for the specific legal advice under both FOIA and the EIRs. The IC concluded that the information properly fell within the scope of the EIRs and had considered the Appellant's complaint on that basis.
12. The right of access to information held by public authorities under FOIA and the EIRs came into force on 1 January 2005. Regulation 5 of the EIRs imposed a general obligation on public authority which held environmental information to make that information available on request (subject to various other specified provisions of the Regulations). "Environmental Information" was defined in Regulation 2 (1) of the EIRs.
13. Regulation 12 contained a number of exceptions to the general duty to provide information on request. The public authority could refuse to disclose information which fell within one of the exceptions if, but only if, the public interest in maintaining the exception outweighs the public interest in disclosure in all the circumstances of the case. The public authority had to apply a presumption in favour of disclosure.
14. The IC had focused on the Appellant's central concern – outlined in his correspondence – in respect of non-disclosure of the legal advice. The scope of his investigation was set out in an e-mail to the Appellant dated 2 August 2010.

15. The IC found:

- The information in dispute was "environmental information" and the correct access regime was the EIRs.
- Disclosure of the information in dispute (the legal advice) would adversely affect the course of justice and Regulation 12 (5) (b) was engaged.
- Having considered the public interest factors in maintaining the exception and in disclosure, the IC concluded that the public interest in maintaining the exception outweighed the public interest in disclosing the information.
- The IC found that the Council's failure to reconsider its decision to withhold the requested information following the Appellant e-mail of 15 February 2010 was a breach of Regulation 11 (3) and (4)

The appeal to the Tribunal

16. In his appeal to the Tribunal Mr Skinner's first comment was that the IC appeared to have "merely sided with" the local authority and not taken into account his concerns as an individual. He was concerned that the IC might have been rushed into making a decision by his appeal against the local authority.

17. He disagreed that the information should benefit from the exemption under "the legal advice privilege". The IC had seen the legal advice which he had requested and he could not understand why there was any reason why such a very simple piece of information should benefit from a legal exemption as all it did was to provide an explanation to a piece of public planning legislation.

18. His position was that decking was frequently used to provide a level amenity space on land that was sloping and possibly difficult to use. Because decking was likely to be on land that was sloping it was also

likely that part of it would be more or less at ground level (probably less than 300 mm above ground level) and the part of the structure would be more than 300 mm above ground level (potentially a lot more).

19. He believed the Council had interpreted the rules in a way that meant that consent would only rarely be required for garden decking because there would nearly always be part of the deck surface less than 300 mm above ground level. That did not appear to be the purpose of the change in legislation which aimed to address the growing number of amenity problems, particularly overlooking/loss of privacy issues, associated with decking.

20. He believed that Article 1 (3) was written before the latest changes in legislation and without the consideration of the problems associated with decking. He believed decking provided a different context to most other developments.

21. In relation to the IC's Decision Notice at Paragraph 34 it was stated that "the advice in question relates to a very specific set of circumstances and is not therefore likely to impact on a significant number of people on a regular basis". His position was that was incorrect because complaints about decking were one of the most frequent complaints to North Somerset Council's Planning Enforcement Team due to the popularity of the development and due to the sloping topography of the North Somerset area.

The questions for the Tribunal

22. The Tribunal has to decide whether the public interest test favours disclosure of the legal advice requested in this particular case.

Evidence

23. The Tribunal has had the benefit of seeing and considering the legal advice given to the Council as a piece of "closed" material.

Conclusion and remedy

24. The Appellant is appealing one issue to the Tribunal – the length of time it took the Council to respond to the request for information – which was not part of his original complaint and to that extent it is outside the scope of this appeal.

25. Also the Appellant states that the IC did not impose a "penalty" on the Council for its failure to conduct an internal review of the request. The IC has no power to impose any kind of penalty in the circumstances. The Decision Notice did state – at Paragraph 11 – that "given the amount of time that this issue has been on-going it would be unreasonable to expect the [Appellant] to wait for the outcome of an internal review and did record that a breach had occurred in that regard (Paragraphs 38-39 and 41 of the Decision Notice).

26. The Appellant complaint about the absence of any official guidance from North Somerset Council to householders about the construction of decking is a different complaint to the one that is being considered in this appeal. This Tribunal has no jurisdiction to consider the provision of any guidance – or require any guidance to be produced – in respect of decking or any other matters.

27. The Tribunal has had the advantage of reading the withheld information which is the legal opinion (as an internal memorandum and an e-mail) provided by the Council's Development Control Department by a solicitor employed by the Council. This clearly attracts legal professional privilege and it has not been waived. In **Malcolm Kirkcaldie v Information Commissioner & Thanet District Council (EA/2006/001)** the Tribunal stated:

"The purpose of this exception [Regulation 12 (5) (b) EIRs] is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege."

28. The Tribunal is satisfied to the required standard – the balance of probabilities – that the public interest in disclosure of the information in dispute does not outweigh the interest in maintaining the exception. The advice was recent and the IC had noted that the Appellant indicated that he intended to challenge the Council's decision that there had been no breach of planning control. The advice was therefore very much "live".

29. While complaints about decking may be frequently made to the Council, the number or proportion of complaints alone was not of sufficient weight to outweigh the strong public interest factors in maintaining the exception in this particular case.

30. It appears to the Tribunal that the Appellant may be under a misapprehension as to the likely nature of legal advice attracting privilege, especially when that advice is provided in contemplation of possible litigation. In his complaint to the Information Commissioner the Appellant sought "clear, unambiguous explanations with legal advice", and in his appeal to the Tribunal he argued that "all it [the advice] did was to provide an explanation to a piece of public planning legislation." In the case of **Rudd v Information Commissioner and the Verderers of the New Forest (EA/2008/0020)** the Tribunal noted that "a legal opinion is not a definitive interpretation of the law and, whatever its contents, it is unlikely to resolve any uncertainty, it would just add to the debate. The only true way to resolve the situation is a ruling from a Court".

31. The Tribunal agrees with that view. Particularly when litigation is in prospect, legal advice is as likely to discuss a range of uncertainties as it is to

provide certainty. It may well assess the relative merits of a range of litigation tactics and advise the client of the possible consequences of these. It is in the interests of the proper administration of justice that such advice should be exempt from disclosure and it would take a substantial public interest to the contrary to justify disclosure. In the nature of privileged legal advice it is unlikely to provide the unambiguous clarity for which the Appellant hoped in making his request for the information.

32. There is no order as to costs.

33. Our decision is unanimous.

34. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) we are now constituted as a First-tier Tribunal. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Robin Callender Smith

Judge

1 March 2011