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

Appeal No: EA/2013/0126

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FER0479939**

Dated: 3rd. June, 2013

Appellant: H. Davies

First Respondent: The Information Commissioner ("the ICO")

**Second Respondent : Rhondda Cynon Taf County Borough Council
("the Council")**

Before

David Farrer Q.C.

Judge

and

Jacqueline Blake

and

Gareth Jones

Tribunal Members

Date of Decision: 17th. January, 2014

Date of Promulgation: 20th January 2014

Representation:

This was a paper determination.

Subject matter:

Environmental Information Regulations 2004 (“EIR”)

- Whether information was held by the Public Authority (Reg.5(1))
- Whether disclosure of withheld information “would adversely affect . . . the course of justice” (Reg. 12(5)(b)).

Reported case; DCLG v ICO and WR [2012] UKUT 103 (AC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 17th day of January, 2014

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

The Background

- 1 In or about June, 2010 a gate was placed across a public highway outside Yn Sy Dwr farm, Abercynon . By letter of 14th. July, 2010 the Council gave notice to the landowner pursuant to s.143 of the Highways Act, 1980 requiring its removal within one month.
- 2 The landowner did not comply with the Notice.

The request for information

- 3 The Appellant, a local resident, inquired of the council what, if any action it was taking in the face such apparent defiance. By letter dated 19th. February, 2012 he made a series of requests for information, including questions as to the identity of the landowner, the issues of law said to arise, the material council policy, what statutory provision could override a s.143 notice, why the council had not acted to enforce the notice and who were the officers responsible for such failures. Although purporting to be requests under FOIA 1(1), having regard to the subject matter, they were clearly made pursuant to EIR reg. 5(1). Nothing turns on the distinction.
- 4 The council responded on 26th. June, 2012 and made some requested information available whilst stating that it did not hold the remainder.

- 5 An internal review was requested and fresh information sought. Some further information subject to the original requests was disclosed, as was the further information covered by the fresh requests incorporated in the request for an internal review.

The Complaint to the ICO

- 6 On 14th. December, 2012, following receipt of the results of the internal review, the Appellant complained to the ICO, whom he had contacted earlier regarding the council's failure to respond within the time limit. The ICO then sought to refine his investigation and it was agreed that the complaint should focus exclusively on the highway obstruction referred to in paragraph 1 and one sub - paragraph of the requests of 19th. February, 2012 which read –

“ 2.1 Please provide up – to – date details of records relating to the failure to implement section(s) 143 and 149 of the Highways Act, 1980. These would include the true (or claimed) identity of the owner – made known to Legal and Democratic Services – and the precise issues that have been put to the Council by that owner”.

- 7 Further material information was located and disclosed by the council but one e mail responsive to this request was identified but withheld in reliance on EIR reg. 12(5)(b). Accordingly, the ICO was required to decide –

- (i) Whether the council held further information responsive to the request.
- (ii) Whether the council was entitled to rely on the reg. 12(5)(b) exception as regards the withheld e mail.

- 8 He concluded as to (i), that it probably did not hold further relevant information and as to (ii), that it was entitled to rely on the exception.

The Appeal to the Tribunal

- 9 The Appellant appealed to the Tribunal against both those determinations and asked the Tribunal to quash the Decision Notice.
- 10 In detailed grounds of appeal and a Reply to the ICO`s Response he argues, as to (i), that the council must disclose its reasons for failing to deal with this obstruction and to enforce its s.143 notice. He submits that there must be further material relating to the failure to act. He does not accept the explanation that the matter had been overlooked nor the council`s assurance in its Response that searches have revealed nothing further.
- 11 As regards (ii), the reg. 12(5)(b) exception, he submits that privilege, if it existed, has been waived and cites the example of another potentially privileged e mail dated 17th. February, 2011, which the council freely disclosed. He argues that the public interest favours overriding such privilege in a case such as this.

Our Decision

- 12 By virtue of EIR reg. 5(1), a public authority “that holds environmental information” is under a duty to disclose it when requested, subject to application of the statutory exceptions. The main issue here is whether it does hold further such information. Much of the Appellant`s argument is really directed at the alleged shortcomings of the Council`s officers in failing to enforce or, apparently, take any worthwhile action in respect of the s.143 notice. His complaint may or may not be justified but it is certainly not for the Tribunal to rule on it. We are concerned, as to issue (i), solely with the question whether the council holds disclosable material, not whether it should do.

- 13 We can certainly see no reason why the council would deliberately withhold such information, since its failure to do so involves conceding an oversight.
- 14 As to the possibility that it is unaware of disclosable information which it holds, we consider that the searches described are more likely than not to have unearthed relevant material, as indeed they have in the course of the internal review and the ICO's investigation.
- 15 Decisions on this type of issue, as on all others arising under FOIA or the EIR, are to be determined on the balance of probability, which, we conclude, plainly favours the council's claim that it holds nothing further save the e mail to which we now turn.
- 16 So far as material, EIR reg. 12(5)(b), reads –
- “(5) 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”*
- 17 The wording of the exception derives from the European directive 2003/4/EC, giving effect to the Aarhus Convention and employs language quite distinct from that of FOIA s.42, which imports into FOIA the exemption relating to legally privileged material (“LPP”). That said, its close relationship to protection of LPP has been recognised in First – Tier Tribunal decisions and, more importantly, by

the Upper Tribunal in *DCLG v ICO and WR [2012] UKUT 103 (AC)* which acknowledged the importance of protecting LPP as a matter of general principle, generally overriding considerations specific to the instant case. The exception is not restricted to protection of privilege in the context of pending litigation.

- 18 The withheld document is a short string of e mails in early July, 2010 between a council officer and a member of the legal department which relate to action over the obstructive gate. It is the only document in the closed bundle for this appeal.
- 19 It is said that litigation remains possible. Whether or not litigation privilege attaches to these e mails, given their date of origin, we have no doubt that legal advice privilege applies. The Appellant`s case is, however, that privilege was waived by disclosure of other documents of a similar kind.
- 20 That argument fails because waiver of LPP as to one document has no bearing on the preservation of LPP in relation to another, unless that other is closely linked so that, for example, the true effect of the first document cannot be discerned without sight of the second. That certainly does not apply here. No public authority should be inhibited in waiving privilege in one case by the fear that it has thereby renounced protection in another unrelated case.
- 21 It is further submitted that the public interest favours overriding the exception, especially having regard to the explicit presumption in favour of disclosure which

EIR reg. 12(2) requires a public authority to apply. However, *DCLG* confirmed earlier first – tier decisions giving “very considerable weight” to upholding the exception so that truly special or unusual features would be required to justify disregarding that weight.

- 22 The privileged e mails in this case are of a very routine kind. They could in no way further or modify the public`s understanding of the issues raised by the Appellant. There is nothing to justify, let alone demand departure from the general principle.

Conclusion

- 23 We therefore dismiss this appeal.

- 24 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

17th. January, 2014