



Neutral citation number: [2023] UKFTT 01075 (GRC)

Case Reference: EA/2023/0363

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

Heard: on the papers in Chambers

**Heard on: 14 December 2023
Decision given on: 2 January 2024**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

STEVEN THOMAS

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision:

The proceedings are struck out under Rule 8(3)(c) because there is no reasonable prospect of the Appellant's case, or part of it, succeeding.

REASONS

1. This is an appeal under the Freedom of Information Act 2000 ("FOIA") against a decision notice from the Information Commissioner (the "Commissioner") of 4 August 2023 (the "DN").
2. Under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the Tribunal may strike out the whole or part of

the proceedings if the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

3. In his response to the appeal, the Commissioner submits that the Appellant's grounds of appeal have no reasonable prospects of success, and accordingly the appeal should be struck out. The Appellant opposes this application.
4. The DN found that Cheltenham Borough Council ("the Council") was entitled to withhold requested information under section 42 (legal professional privilege). The withheld information consists of a report presented to the Council's cabinet, an expert witness report and legal advice provided to the Council as client. The DN found that the exemption was engaged as it relates to live action being undertaken by the Council and that the information was created for the dominant purpose of preparing a case for litigation. The DN found that the public interest in withholding the information outweighed the public interest in disclosure, giving particular weight to the fact that disclosing the information has the potential to affect the outcome of ongoing legal action.
5. Under section 58 FOIA, the Tribunal can allow an appeal against a decision notice if it 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.
6. The Commissioner says that the Appellant's grounds of appeal are a ventilation of his concerns about the public's access to Council meetings, which is not an issue the Tribunal has jurisdiction to consider. The Commissioner also says that the Appellant does not articulate any specific reason why the exemption at Section 42(1) FOIA is not engaged by the requested information, and simply asserts that the public interest favours disclosing the requested information without saying why this is the case.
7. The Appellant's grounds of appeal complain about the public persistently being excluded from discussions at Council and Cabinet meetings. He says, "*We (the public) are concerned that there is an agenda being rolled out and this provision is being abused to stop the public from finding out what is being conducted in private at these meetings*". The grounds of appeal do not directly address the legal privilege exemption.
8. The Appellant opposes the strike out application and set out his position in an email to the Tribunal on 29 September 2023. He says that the Commissioner has not independently reviewed the information in question, and has simply relied on information given by the Council. He says that it is for the public authority to demonstrate, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs the public interest in disclosure. He makes the point that the Council has not demonstrated with evidence why this would be the case. He also says that the Bill of Rights 1688 is superior to any subsequent act or statute passed by Parliament. He says that he requires the Tribunal to independently review the actual information that is not being disclosed by requesting the information.

9. I have considered the Upper Tribunal's decision in **HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation)** [2014] UKUT 0329 (TCC), in which it is stated at paragraph 41 that:

"...an application to strike out in the FTT under rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing...The Tribunal must avoid conducting a "mini-trial". As Lord Hope observed in Three Rivers the strike out procedure is to deal with cases that are not fit for a full hearing at all."

10. I have considered strike out in this appeal, taking into account the particular exemption relied on by the Council. The relevant legal principles are as follows:

- a. It has been accepted in numerous cases that there is a strong public interest built into legal privilege, based on the interest in public bodies being able to receive frank legal advice in order to assist them to make appropriate decisions. This was confirmed by the High Court in **DBERR v O'Brien and IC** [2009] EWHC 164 (QB) – *"The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least."* (Wyn Williams J at para 53).
- b. The mere fact that legal professional privilege applies to the information means it is in the public interest for that privilege to be upheld. It is not necessary for the person seeking to protect the information to show any additional prejudice or chilling effect that would be caused by disclosure (See **DBERR** paragraph 51 and **Callender Smith v Information Commissioner & Crown Prosecution Service** [2022] UKUT 60 (AAC), paragraph 50). An appellant must therefore show that there are features supporting disclosure which are sufficient to outweigh the public interest in protecting legal professional privilege.
- c. This does not mean the weight is always the same. As accepted by the Upper Tribunal in **DCLG v Information Commissioner & WR** [2012] UKUT 103 (AAC), in relation to the legal privilege under the Environmental Information Regulations 2004, *"...the weight that should properly be given to the exemption in any event, by reason of the risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of [legal professional privilege], may vary from case to case. If, for example, the requested information is very old, or relates to matters no longer current, a disclosure may damage that confidence to a lesser extent than if the information was recent, or relates to matters still current."* (paragraph 45).

There may be factors that limit the importance of protecting legal professional privilege in a particular case. Similarly, there may be factors which increase that importance, such as the context of the legal advice and the risk of prejudice to other related matters. The starting point of in-built weight, however, always applies. This is based on the general importance to the public of protecting legal professional privilege.

11. I have applied these principles to the Appellant's arguments. The Appellant does not dispute that the exemption is engaged. He says that it is for the Council to provide evidence demonstrating that the public interest in maintaining the exemption outweighs the public interest in disclosure. I disagree. The above authorities make it clear that the legal professional privilege exemption has in-built public interest, and it is not necessary for a public authority to show any additional prejudice or produce evidence. Although the weight of this public interest may be weakened by factors such as the information being very old, I note that in this case the advice relates to legal matters that were still live at the time of the Appellant's request. This would increase the public interest in withholding the information.
12. This means it is for the Appellant to show that there are features supporting disclosure which are sufficient to outweigh the public interest in protecting legal professional privilege. He refers to general concerns that the public is being excluded from Council discussions. However, he does not raise any public interest arguments which address the legal professional privilege exemption itself. Taking into account the in-built weight of the public interest in this exemption, and the fact the legal proceedings were live at the time of the request, I find that the Appellant does not have a realistic as opposed to a fanciful prospect of succeeding on the issue at a full hearing.
13. The Appellant has also said that the Bill of Rights 1688 is superior to any subsequent act or statute passed by Parliament, and quotes that "*nothing should be done to prejudice the people*". The Appellant says that this is being breached through persistent exclusion of the public from Council meetings. However, this does not override the provisions of FOIA in relation to legal professional privilege, and the Appellant has not explained any basis for asserting that it does. The Tribunal does not have jurisdiction to consider an issue about exclusion of the public from Council meetings.
14. For the reasons explained above the Appellant does not have any reasonable prospect of identifying any error of law in the Commissioner's decision or showing that the Commissioner should have exercised his discretion differently. I therefore find that there is no reasonable prospect of the Appellant's case, or any part of it, succeeding. The proceedings are struck out.

Signed: *Judge Hazel Oliver*

Date: 17 December 2023

