



NCN: [2023] UKFTT 428 (GRC)

Case Reference: EA/2022/0202

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

**Determined, by consent, on written evidence and submissions.**

**Considered on the papers on 15 May 2023.**

**Decision given on: 18 May 2023**

**Before**

**TRIBUNAL JUDGE Stephen Cragg KC**

**TRIBUNAL MEMBER Susan Wolf**

**TRIBUNAL MEMBER Jo Murphy**

**Between**

**DR LINDA DERRICK**

Appellant

**And**

**INFORMATION COMMISSIONER**

Respondent

**Decision: The appeal is Dismissed.**

**Substituted Decision Notice: No substituted decision notice.**

## **REASONS**

### MODE OF HEARING AND PRELIMINARY MATTERS

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
2. The Tribunal considered an agreed open bundle of evidence of 113 pages.

### BACKGROUND

3. The Appellant made the following information request to the Hughenden Parish Council (the Council) on 9 December 2021:

I am advised that I am acting in the interests of the Council and residents and taxpayers in trying to ensure that taxpayers' money is not expended on rents for leases which are not valid. That is the responsibility of all councillors and is the reason I am requesting the legal advice from BP Collins as to the validity of the leases. I am therefore acting in the public interest.

As background, I am also acting in the interests of Council, residents and taxpayers in seeking to ensure that the Council does not dispose of valuable Council assets by giving them away.

I am objecting to the application made by HCST to the Land Registry to transfer the titles of land currently registered to HPC. That is entirely in line with my acting in the public interest and in the interests of the Council and the residents and taxpayers. If anyone, I am in dispute with HCST.

There is therefore no conflict of interest.

I would therefore be grateful for the legal advice on the validity of the leases given by BP Collins.

4. The background to the case was that the Council obtained legal advice from a firm of Solicitors, BP Collins, which was prompted by the Council receiving notices of objection received at the Land Registry, about payments from the council to the Hughenden Community Support Trust (HCST), and whether 99 year leases between the Council and HCST were valid.
5. As one of the objectors, the Appellant was asked by the Parish Clerk to recuse herself from further discussions on the matter relating to HCST due to a conflict of interest. It is apparent from the request correspondence, that the Parish clerk had explained to the Appellant that as the Appellant was one of the main objectors (as received by the Land Registry), that it would be inappropriate to share the legal advice with the Appellant.
6. It is following this that the Appellant made the FOI request which is subject of the Appeal.
7. The Council refused to provide the requested information citing section 42 Freedom of Information Act 2000 (FOIA) (legal professional privilege) as the basis for doing so. The Appellant complained to the Commissioner who provided a short decision notice dated 20 July 2022. The relevant part of the decision notice reads as follows:-

7. In this case, the complainant has requested legal advice sought by the Council relating to the validity of leases. The Commissioner is satisfied from the wording of the request that the information falling within the scope of this request would constitute confidential legal advice provided by a qualified legal adviser to their client. This means that this information is subject to legal professional privilege, and the Commissioner is aware of no evidence suggesting that this privilege has been waived. The exemption provided by section 42(1) of the FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

8. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain

confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.

...

10. The Commissioner considers that the balance of public interest lies in withholding the information and protecting the Council's ability to obtain free, frank and high quality legal advice without the fear of premature disclosure. The Commissioner is not aware of any public interest arguments that are enough to outweigh or override the inbuilt public interest in the information remaining protected by legal professional privilege.

8. The Commissioner concluded that the public interest in maintaining the exemption in section 42(1) FOIA outweighs the public interest in disclosure, and therefore, that the Council has correctly applied section 42(1) FOIA.

## LEGAL FRAMEWORK

9. Section 42 FOIA states that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt information. Section 42(1)(a) FOIA reads, materially, as follows:-

**42.— Legal professional privilege.**

(1) Information in respect of which a claim to legal professional privilege... could be maintained in legal proceedings is exempt information.

10. The development of the doctrine of privilege in relation to legal advice, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court, ex p B*, [1996] AC 487, and then summarised by him as follows at 507D:

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.

11. It is not disputed in this case that the advice obtained by the Council is covered by legal professional privilege, and that s42 FOIA is engaged.
12. However, this 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.
13. In relation to the application of the public interest test in s42 FOIA cases, in *DBERR v O'Brien v IC* [2009] EWHC 164 QB, Wyn Williams J gave the following important guidance:-

41. ... it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA . 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 question.

53.....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.

14. Further, in *Corderoy and Ahmed v Information Commissioner, A-G and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted as follows in emphasising that the s42 FOIA exemption is not a blanket exemption:-

68. The powerful public interest against disclosure ... is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute.

## THE APPEAL AND THE HEARING

15. The Appellant's appeal is dated 25 April 2022. The grounds are listed as follows (obvious typos corrected) :-

The ICO points out that legal professional privilege protects the confidentiality of communications between a lawyer and client and that legal advice is exempt information.

The ICO then goes on to apply the public interest test.

However, in their decision the ICO makes no account of the fact that I am not just a member of the public but also a councillor on Hughenden Parish Council. I made that clear in my complaint to the ICO (attached). The ICO does not even mention the fact that I am a councillor.

I think the ICO's decision is wrong because, as a councillor, I am part of the corporate body

(Hughenden Parish Council which is the client. So the legal advice should be available to the client i.e. the Council. The legal advice should not be restricted to some councillors (unless presumably there are legal reasons not to do so which there are none in this case).

In addition, there is no reference in the ICO's public test to the fact that I am a councillor.

There are additional reasons for me to have the information over and above those which would apply if I was not a councillor.

First I need the legal advice to take well informed decisions at Council. It is in the public interest that I do so, particularly on financial decisions for which this advice is crucial.

Second, as I made clear in my complaint I have corporate and personal financial responsibilities and liabilities as a councillor for the Council's decisions. The legal advice relates to HPC expenditure for which I am corporately and personally accountable.

I believe I am entitled to the legal advice provided by the Council's solicitors to the Council.

I think the ICO was wrong in its decision because it did not take into account the fact that I am a councillor on Hughenden Parish Council.

16. The Commissioner notes that the Appellant does not appear to challenge the Commissioner's finding that s.42(1) FOIA is engaged in this case, but rather disputes the weight the Commissioner may have attached to particular issues when considering the balance of public interest in disclosure of the requested legal advice.

The Commissioner says:-

...the Appellant's arguments appear to misunderstand that disclosure under FOIA is disclosure to the world at large. Disclosure of any legal advice to the Councillor in her role as an individual Councillor is a separate consideration for the corporate body or the Council to determine and is distinct from disclosure under the FOIA.

17. The Commissioner applied to strike out the appeal. This application was refused by the Tribunal on 23 December 2022. However, the Tribunal judge commented that:-

There is one point well made in the Response which I would ask the Appellant to reflect upon. This is that disclosure under FOIA is 'disclosure to the world'. This means that, if she is successful in this appeal, the legal advice she has requested would not be made available only to her, but also to the public in general. It may be possible for the Appellant to discuss with the Council whether disclosure otherwise than under FOIA would be preferable in order to avoid this eventuality.

18. The Appellant now comments that although she has corresponded with the Council on this issue, she has not received a reply.

## DISCUSSION

19. The Appellant's appeal notice and submissions concentrate her argument on the fact that she is a councillor and therefore should be entitled to see the legal advice. Judge McKenna, when refusing the strike out application, noted that when information is disclosed under FOIA there would be no restrictions on how it could then be used. It is worthwhile explaining why that is the case.

20. Within FOIA itself, there are no provisions which allow a public authority to place any conditions as to whom a requester might further disseminate information once it has been disclosed under FOIA. The same is true of the Commissioner's powers: the Commissioner cannot direct that further disclosure is limited in any way. When a case comes to the Tribunal, the Tribunal's functions are restricted to those set out in s58 FOIA. If the Tribunal does not dismiss the appeal, it can otherwise only 'allow the appeal or substitute such other notice as could have been served by the Commissioner'. Thus, if the Commissioner cannot limit to whom disclosure is made once a requester has established an entitlement to disclosure, then neither can the Tribunal. There is nothing in FOIA or the Tribunal Rules which would allow the Tribunal, for example, to direct that information should be disclosed to the requester only if the requester undertakes not to disclose the information to anyone or else, or to withhold it from a particular description of person.

21. In terms of case law on this issue there are cases where the courts have confirmed this view. One such case is *Office of Government Commerce v Information Commissioner* [2010] QB 98 (OGC) (a case which explored the relationship between parliamentary privilege and the Commissioner's powers) where Stanley Burton J said at paragraph 72 that:-

72 Disclosure under FOIA is always to the person making the request under section 1 . However, once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it had prior to disclosure. This underlines the need for exemptions from disclosure.

22. The upshot of this is that the Tribunal must consider the appeal, and the public interest factors involved on the basis that if the legal advice is disclosed to the Appellant then there are no restrictions on what the Appellant can then do with the information and effectively the information is in the public domain. For example, if the Appellant decides that she would like to make the legal advice available on line or to communicate some or all of it to others then there is nothing to prevent her doing that, and the Tribunal has no power to impose restrictions.

23. In that context, the central question in this case is whether the Commissioner was correct to find that the public interest in relation to any documents covered by legal



professional privilege favoured the withholding rather than the disclosure of those documents.

24. The Tribunal has not seen the relevant withheld information but it is not in dispute that it is legal advice obtained by the Council and relates to a possible dispute about the payments of rent by the Council to HCST and the validity of leases, and therefore it consists of information to which the exemption in s42 FOIA applies.

25. In relation to the application of the public interest test in s42 FOIA cases we repeat what was said in the *DBERR case as set out above and that the 'proper approach for the Tribunal' is v O'Brien v IC* [2009] EWHC 164 QB, Wyn Williams J gave the following important guidance:-

...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.

26. Thus, we recognise the significant in-built weight to be given to the exemption in considering the public interest balance. It is then necessary to assess whether there are other factors to be taken into account which support non-disclosure, and then consider whether the public interest in disclosure is equal to or outweighs those combined factors.

27. No specific additional factors have been raised by the Commissioner which justified the decision that the public interest favoured non-disclosure.

28. In relation to public interest factors in favour of disclosure, there is a public interest in knowing the content of legal advice obtained by the Council in relation to controversial issues, and this would support transparency and accountability. We also accept that there is a public interest in disclosure of legal advice to a member of the Council such as the Appellant, who has been elected to represent members of the public. However, in relation to this latter

we must also bear in mind that disclosure to the Appellant would also mean disclosure to the world at large.

29. We recognise that there may be cases where the public interest in disclosure will outweigh the in-built public interest in protecting LPP, and that s42 FOIA does not provide for a blanket exemption. However, in our view this is not one of those cases and the Commissioner was correct to find that the balance of public interest lies in withholding the information and protecting the Council's ability to obtain free, frank and high quality legal advice without the fear of premature disclosure.
30. The public interest in disclosure is not strong enough to outweigh that built-in public interest against disclosure in legal professional privilege cases, and we agree that the public interest balance is in favour of non-disclosure.
31. This decision is not a decision that the Appellant should not see the legal advice. There may be other avenues to explore where this might be appropriate. However, this decision does find that access for the Appellant to the legal advice through FOIA, which would effectively amount to disclosure to the public at large, is not permitted.

## CONCLUSION

32. On the basis of the above, the Tribunal dismisses the appeal.

**Stephen Cragg KC**

Judge of the First-tier Tribunal

Date: 17 May 2023

Date Promulgated: 18 May 2023

