



Case Reference: EA-2023-0446
Neutral Citation Number: [2024] UKFTT 00445 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers
Heard on: 15 May 2024
Date of Decision: 31 May 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PIETER DEWAAL
TRIBUNAL MEMBER SUSAN WOLF

Between

PENNY BENCE

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Decision:

1. The appeal is allowed in part.
2. A substitute decision notice will be issued once the tribunal has determined all outstanding issues.

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-243711-H9P2 of 9 October 2023 which held that Cornwall Council ('the Council') was entitled to rely on regulation 12(5)(b) of the Environmental Regulations 2004 (EIR) (adverse effect on the course of justice) to withhold the information.
3. The appeal has been allowed in part. In summary the tribunal has decided that:
 - 3.1. The Council was entitled to rely on regulation 12(5)(b) to withhold communications with its legal department.
 - 3.2. The Council was not entitled to rely on regulation 12(5)(b) to withhold pre-existing documents or pre-existing emails either attached to or forwarded by those communications referred to in 3.1 and which do not fall themselves fall within 3.1.
 - 3.3. The Council was in breach of its obligations under EIR by failing to respond to part two of the appellant's revised request sent to the Council on 10 February 2023.
 - 3.4. Some of the documents in the closed bundle are outside the scope of the request.
4. The tribunal has issued a case management order and will determine the application of any other exceptions put forward by the Council in relation to the information set out in 3.2 before it issues a substitute decision notice.
5. This decision contains a closed annex. The closed annex only contains a table identifying which documents in the closed bundle fall within 3.1 and 3.4 above. It does not contain any closed reasoning. A copy of the closed annex has been sent to the Commissioner and the Council. It has been withheld from the appellant. It is necessary to withhold the annex from the appellant at this stage because otherwise the purpose of the appeal would be defeated. This will be reviewed by the Judge on the conclusion of these proceedings and/or at the conclusion of any appeal.

Factual background to the appeal

6. This matter arises out of the installation by the Council in 2021 of fixed bollards in Portreath, Cornwall which prevent access by vehicles to certain properties, including the appellant's. The fixed bollards replaced removable bollards that had previously been in place. The Council states that the bollards were installed to prevent illegal vehicular use of the footway.

Request and response

7. Ms. Bence made the following request on 5 January 2023:

"Please supply all the written information that you hold, which I am entitled to receive under the Freedom of Information Act 2000, in any form of written file, record, email or contemporaneous note mentioning information regarding the Chynance bollard installation. Specifically, this includes:-

- The initial complaints & the considerations leading to the installation of the fixed bollards at Chynance in April 2021, from approximately April 2020 on.
- Information relating to the Chynance bollards between myself & other complainants & Highways/Cormac (from April 2021 to January 2023).

- Information about any other complaints relating to the Chynance bollards to the local County Councillor.
 - Any other relevant records of Council meetings.
 - Any written information between the local County Councillor (currently D Crabtree) & Highways (between 2021 and 2023) that mention any representations about the bollards.
 - Communications between Highways and Legal departments, including attachments (between April 2021 & January 2023) concerning any deeds of transfer or information about rights of way
 - Communications between Highways & Legal departments that dispute or are evidence counter to the rights of way that are shown on the deeds of transfer for the beachfront properties – that is odd number of Chynance 23 to 39 (between April 2021 & January 2023).
 - All communications from or to the Legal department showing consideration or advice about of the rights of way of the Chynance Houses numbers 23 to 39 (between April 2021 & January 2023).”
8. The Council replied on 6 February 2023. The Council refused the request on the basis that it was manifestly unreasonable under regulation 12(4)(b) EIR because of the burden of complying.
9. On 10 February 2023 Ms Bence submitted the following revised request:
- “...all communications, including attachments, between Highways & Legal, relating to the Chynance bollards & rights of way for Chynance properties, odd numbers 23 to 43, between April 2021 & September 2021. These are the last 3 points in my original FOI request but with significantly reduced date range.
- If time limits allow, I would then like to receive the information on the initial complaints & considerations leading to the installation of the fixed bollards in Chynance from approximately April 2020 to April 2021.”
10. The Council withheld the information initially under section 42 FOIA (legal professional privilege), but on internal review withheld the information under regulation 12(5)(b) EIR (adverse effect on the course of justice).

Decision notice

11. In a decision notice dated 9 October 2023 the Commissioner concluded that the Council was correct to withhold the requested information under regulation 12(5)(b).
12. The Commissioner was satisfied that the requested information consisted of confidential communications between a client and a professional legal advisor, made for the dominant purpose of seeking and/or giving legal advice.

13. The Commissioner noted that all the withheld information formed part of the continuum of the seeking of and provision of legal advice, and concluded that disclosing the withheld information would reveal the strengths and weaknesses of the council's position, and risk unbalancing the level playing field under which legal proceedings are meant to be carried out. The Commissioner was satisfied that a disclosure of the information would risk undermining the level playing field in such proceedings should a challenge to its decisions be made.
14. The Commissioner noted that the withheld information relates to a dispute around land law which remained live and the Commissioner was satisfied that there is a potential for legal challenges to be made in the future due to the nature of the complaints made to the council about the positioning of the bollards.
15. The Commissioner was therefore satisfied that disclosure of the requested information would have an adverse effect on the course of justice.
16. The Commissioner agreed that there was a public interest in creating transparency on issues regarding the restriction of access, and more widely, how the Council goes about determining the situation in cases where that comes into question. The Commissioner noted that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, including not prejudicing legal disputes. The Commissioner's decision was, therefore, that the balance of the public interests favours the exception being maintained even taking account of the presumption of disclosure.

Grounds of Appeal

17. The Grounds of Appeal are in essence:
 - 17.1. The Commissioner was wrong to hold that disclosure would adversely affect the course of justice and/or
 - 17.2. The Commissioner was wrong to hold that the public interest favours maintaining the exception.
18. The appellant raises the following particular points:
 - 18.1. The appellant has not informed the Council that she would be taking legal action to remove the bollards.
 - 18.2. Land ownership has never been questioned and so the Council did not need to seek clarity on this.
 - 18.3. The bollards have now been repositioned so cannot be part of any potential legal action to remove them from where they were placed in April 2021.
 - 18.4. Documents released in response to the appellant's subject access request suggest that the requested documents are not legally privileged.
19. In addition the appellant states that she would like to receive the information requested in the second part of the request on 10 February 2023 (i.e. the information on the initial complaints & considerations leading to the installation of the fixed bollards in Chynance from approximately April 2020 to April 2021).

The Commissioner's response

20. The Commissioner submitted that the fact that the appellant has not commenced litigation is of no relevance, as long as there is a potential for legal challenges then legal professional privilege may apply. The Commissioner submitted that he was correct to conclude that the withheld information was covered by legal advice privilege.
21. In relation to the public interest the Commissioner submitted that the appellant has not provided any compelling reasons for disclosure.

The appellant's reply

22. The appellant reiterates a number of points made in her grounds of appeal. She repeats her assertion that the request was not for information that is legal advice or covered by privilege. The only correspondence about the legal position that the appellant has seen is an email dated 16 August 2021 which states "This is not a matter for Legal but for whichever department the issues of the bollards was first raised with, possibly Cormac."
23. The appellant asserts that she has no other way of obtaining the information because the Council are not responding to her emails.
24. Finally the appellant repeats that the Commissioner has not considered the request for information on complaints and considerations given to the installation of the fixed bollards in April 2021.

Legal framework

25. 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).

26. 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.
27. 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)**)
28. 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))
29. 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)
 30. 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.
 31. 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.

32. The Court of Appeal in Three Rivers District Council v Governor and Company of the Bank of England (No.5) ('Three Rivers (No.5)') 2003] EWCA Civ 474 limits the range of employees of a company whose communications with the company's lawyers are covered by legal advice privilege. Only employees who are acting as 'the client' will be covered, but any employee authorised to obtain legal advice from the in-house lawyers can be 'the client' Menon, Menon and Autumn Days Care Limited v Herefordshire Council [2015] EWHC 2165 (QB).
33. Legal advice privilege also protects confidential communications to third parties, including employees that are not 'the client', that record, evidence, reproduce or otherwise reveal the legal advice. So a record of the privileged advice in the form of a summary of the advice would also be protected: The 'Good Luck' [1992] 2 Lloyd's Rep. 540; The 'Sagheera' [1997] 1 Lloyd's Rep. 160 and Three Rivers (no.5).
34. Pre-existing documents which are not themselves privileged do not achieve the protection of privilege by being attached to a privileged letter (Ventouris v Mountain [1991] 1 WLR 607; Sports Direct International Plc v The Financial Reporting Council [2020] EWCA Civ 177).
35. 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 applies equally in EIR cases.
36. The statutory context includes the backdrop of the Directive and Aarhus discussed above, and the policy behind recovery 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.
37. 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

38. 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

39. The issues we have to determine are:

- 39.1. Has the Council provided a response to the request for the initial complaints and considerations leading to the installation of the bollards?
- 39.2. Would disclosure of the withheld information adversely affect the course of justice?
- 39.3. In all the circumstances of the case, does the public interest in maintaining the exception outweighs the public interest in disclosing the information?
- 39.4. Does the presumption in favour of disclosure mean that the information should be disclosed?

Evidence and submissions

40. We have read an open and a closed bundle of documents, which we have taken account of where relevant. We have also taken account of an email from the appellant dated 5 February 2024 which contains some additional submissions.

41. The closed bundle contains the withheld information and a redacted version of correspondence in the open bundle. The redactions are limited to those that reveal the content of the withheld legal advice. 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

42. 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.

Has the Council provided a response to the request for the initial complaints and considerations leading to the installation of the bollards?

43. Although this was not addressed in the decision notice, it was raised in the section 50 complaint to the Commissioner and therefore falls within our remit.

44. The revised request sent to the Council on 10 February 2023 had two parts. The first part asked for certain communications, including attachments, between Highways and Legal between April 2021 and September 2021. The Council responded to this part of the request on 1 March 2023.

45. The second part of the revised request asked for ‘information on the initial complaints & considerations leading to the installation of the fixed bollards in Chynance from approximately April 2020 to April 2021’. In breach of its obligations under EIR the Council has not provided any response to this part of the request, either by disclosing the information under regulation 5 or by refusing the request under regulation 14. To this extent the appeal is allowed.

46. Without deciding the matter, the tribunal observes that it is likely that the Council will hold some recorded information on the initial complaints and considerations that lead to the installation of the bollards. For example the tribunal notes that page A110 of the closed bundle appears to contain information relevant to this part of the request and appears to suggest that further recorded information may be held.
47. We have determined that it is appropriate to issue a substitute decision notice requiring the Council to either provide the requested information or to refuse the request under regulation 14 EIR. We will issue the substituted decision notice once we have reached our final conclusions in relation to the other part of the request.

Regulation 12(5)(b)

Scope

48. The information identified by the Council as falling within the scope of the request includes:
 - 48.1. Emails between the legal department and others.
 - 48.2. Attachments to those emails.
 - 48.3. Pre-existing emails forwarded to or from the legal department.
49. Taking into account the wording of the request, which refers explicitly to attachments, we find that all three categories of information fall within the scope of the request in so far as they relate to the Chynance bollards and rights of way for Chynance properties, odd numbers 23 to 43.
50. There are a number of emails in the closed bundle which, we find, do not relate to the Chynance bollards and rights of way for the relevant properties. These emails relate purely to the internal processes for commissioning legal advice, for example the correct coding, the correct forms etc. or are internal legal department emails concerning purely administrative matters such as those relating to the opening of a file etc. The tribunal finds that these emails do not fall within the scope of the request and do not need to be disclosed. The relevant emails are specified in the closed annex.
51. We find that the rest of the documents in the closed bundle do relate to the specified issue and are in scope of the request.

Would disclosure adversely affect the course of justice?

52. 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.
53. 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.

54. 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.
55. It is important to note that pre-existing documents which are not themselves privileged do not achieve the protection of privilege by being attached to a privileged letter (**Ventouris v Mountain** [1991] 1 WLR 607 and **Sports Direct International Plc v The Financial Reporting Council** [2020] EWCA Civ 177). By analogy, pre-existing emails which are not themselves privileged do not achieve the protection of privilege by being forwarded by a privileged email.
56. For that reason, we do not accept the Council's argument that information that was 'sent to legal services for the purpose of seeking and obtaining legal advice' is covered by legal advice privilege. A document is not privileged because 'it relates to the communications that form part of a continuum which aims to keep client and lawyer informed. That is not the test. Pre-existing documents that were simply attached to privileged emails or forwarded to the legal advisors do not achieve the protection of privilege by being so attached or forwarded.
57. We have reviewed the documents in the closed bundle. We accept that any emails that are sent to or from the legal department are communications between lawyer and client for the purposes of giving or receiving legal advice.
58. The attachments to those emails are pre-existing documents. The attachments are not in themselves, communications between lawyer and client for the purposes of giving or receiving legal advice. They do not gain privileged status by virtue of being attached to a privileged email.
59. We reach the same conclusion in relation to the pre-existing emails or chains of emails (of whom the sender or recipient is not the Council's legal department) that have been forwarded to the legal department. These emails are not, in themselves, communications between lawyer and client for the purposes of giving legal advice. They do not gain privileged status by virtue of being attached to a privileged email.
60. Although the exception in EIR is not limited to documents covered by legal professional privilege, the Council's argument that disclosure would adversely affect the course of justice is based solely on its assertion that the entirety of the requested information attracts legal advice privilege. It has not identified any other adverse affect on the course of justice, and having read those documents, no other adverse affect is apparent to the tribunal.
61. For those reasons we find that regulation 12(5)(b) is engaged only in relation to emails between the legal department and others. These documents are identified in the closed annex. We find that the Council was not entitled to rely on regulation 12(5)(b) in relation to the second and third categories of information within the scope of the request i.e. attachments to those emails and pre-existing emails forwarded to the legal department by others. The appeal succeeds to that extent.

62. The Council has not put forward any alternative exceptions. However, the Council has proceeded on the basis of a mistaken view as to the breadth of the principle of legal advice privilege. We have decided that it would not be fair to simply issue a substitute decision notice and order disclosure of those documents without giving the Council the opportunity to consider if any other exceptions apply. The Judge has issued a separate case management order to allow the Council to put forward any additional exceptions.

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

63. This part of the decision applies only to the limited number of documents in relation to which we have found that the exception is engaged.

64. 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.

65. There would be an even stronger public interest in maintaining the exemption where the matter to which the advice relates was 'live' at the relevant date. The relevant date for these purposes is the date at which the Council responded to the request. We do not know if the bollards had been removed by the date of the response to the request, but even if the bollards had been removed that would not necessarily have prevented future litigation or a future dispute.

66. We accept that there is a public interest in disclosure. There is a public interest in transparency in relation to the decision to install the bollards and the Council's response to complaints about the installation, taking into account the cost to the public purse, the restriction of access and the impact on residents. We accept that disclosure would increase transparency and give rise to a better understanding of the Council's actions.

67. Even assuming that the matter was no longer live at the relevant date, we have concluded that the public interest in disclosure is outweighed by the strong in-built interest in not undermining the principle of legal professional privilege.

68. For those reasons the Council was entitled to rely on regulation 12(5)(b) EIR to withhold the documents identified in the closed annex.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 24 May 2024