



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

Case No. EA/2013/0238

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50501807
Dated: 29 October 2013**

Appellant: MARTIN FARRELL

Respondent: INFORMATION COMMISIONER

On the papers: Field House, London

Date: 19 February 2014

Date of decision: 12 March 2014

Before

ROBIN CALLENDER SMITH
Judge

and

NIGEL WATSON and ANDREW WHETNALL
Tribunal Members

Representations:

For the Appellant: Mr M Farrell

For the Respondent: Ms C Nicholson, Solicitor for the Information Commissioner

Subject matter: Environmental Information Regulations 2004

Exceptions, Regs 12 (4) and (5)

- Legal professional privilege (5) (b)

Cases:

Department for Communities and Local Government v Information Commissioner & WR [2012] UKUT 103.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 29 October 2013 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. On 8 April 2013 the Appellant wrote to Mole Valley District Council (MVDC) asking for information in relation to land title SY761956. This land was used for allotments.
2. In 1865, by virtue of the Enclosure Acts, this land was granted to the Churchwardens of Leatherhead to manage under the Leatherhead Common Inclosure Award of 1865. The award states that the land was awarded "in trust for the labouring poor of the said Parish....."
3. On 27 July 1896, by a Transfer/Indenture, the management of the allotments was transferred to Leatherhead Urban District Council, the predecessor in title to Mole Valley District Council.

4. In August 1903¹ the Leatherhead Urban District Council stated (during the course of a meeting) that it managed - but did not own - the allotments.
5. In 2006 the status of the allotments was changed from Statutory to non-statutory.
6. On 16 May 2007 the Mole Valley District Council registered the land with Title Absolute with the Land Registry.

The request for information

7. The Appellant's information request was for:

Copies of all the instructions to and opinions from any Solicitors, Barristers, Surveyors or other professional advisers or experts, whether employees of the Council or outsiders, relating to the registration of the land; the legal status relating to possible ownership of the land; with regard to any gifts and/or covenants; or any other advice pertaining to the land title numbered above.

8. The Council – having conducted an internal review – withheld information on the basis that it was subject to legal professional privilege under the provisions of Regulation 12 (5) (b) of the Environmental Information Regulations.

The complaint to the Information Commissioner

9. The Appellant complained to the Commissioner on 3 June 2013. After considering the matter the Commissioner concluded that the Council had correctly applied the relevant regulation in relation to legal professional privilege to withhold the information.
10. The legal advice in question related to a live matter and the release of the legal advice would have the potential publicly to disclose any strengths and weaknesses within the Council's position. If the Council then faced a

¹ As reported in the *Surrey Mirror* of 28 August 1903.

legal challenge the disclosure would have provided an unfair advantage to any opposing party and would prevent fair and reasonable legal debate.

11. The matter had been widely publicised by the Council with a high degree of public engagement and transparency. The Commissioner had viewed the publicly available documents that defined the Council's timescale for managing the disposal and development of the site. Any formal challenge to the Council's actions could still be made and the development proposal had not reached the planning application stage.
12. Although the Council's actions had received some public opposition he did not consider that the public interest arguments for disclosure were equal or greater than the public interest inherent in maintaining the exception.

The appeal to the Tribunal

13. The Appellant submitted both Grounds of Appeal and a Response to those grounds from the Commissioner. In summary:
 - (1) He believed his request for information should be dealt with under the FOIA regime and not under what he perceived as the wider provisions of the Environmental Information Regulations regime.
 - (2) The relevant public body – as a local authority – was neither a corporate body nor an individual with interest to protect. The Council should have nothing to hide nor any right to hide it. Part of the responsibilities of carrying out the duties of the Council was to obtain legal and professional advice which he – as a local Council Tax payer – should be allowed access to because it had been sought and in part paid for by local people like himself.
 - (3) The Council had made no reference to any possible adverse effect of releasing the information sought.

- (4) Without disclosure of the requested information it was not possible to ascertain how the decision to register the land had been informed. It prevented the policy decision being scrutinised and prevented the Council being held to account for its decision. It did not promote transparency.
- (5) The Appellant was not an “opposing” party but someone who had paid in part for the legal advice in question and who was requesting a copy of it. He was not proposing to litigate against the Council and had not threatened to do so.
- (6) He believed that the public interest in trying to establish the basis on which the Council had registered land in its name which was the subject of a Charitable Trust (ownership of which the Council itself denied in 1903) outweighed the interest in preserving legal professional privilege.
- (7) He did not believe that reliance on *DCLG V Information Commissioner & WR* was appropriate within his appeal. That case had related to an Appellant threatening Judicial Review. The prejudice in that case had been that the Appellant would know the local authority’s case without there being any reciprocity.

Evidence

14. The Tribunal has seen and read – on a closed and confidential basis – the legal opinion that forms the information that was withheld by the Council. The Tribunal is experienced and rigorous in assessing the balancing of the public interest issues in this process, conscious that the Appellant cannot see the material at this stage.

Conclusion and remedy

15. The Tribunal is satisfied that the request information was correctly categorised by the Commissioner as environmental information because it was information on activities affecting or likely to affect the elements of the environment, including the landscape.
16. Having considered the information itself the Tribunal is satisfied that it falls squarely into regulation 12(5) (b) and is – specifically – not only covered by the regulation but is information that can properly attract legal professional privilege (LPP).
17. *DCLG v Information Commissioner & WR* ([2012] UKUT 103)3 (DCLG) is the Upper Tribunal decision which bears directly on this area.² It noted that there was no *express* [emphasis added] exemption in respect of information for which the public authority could claim LPP but went on to say however:

It is in our judgment clear that the factors which can be taken into account in determining whether the course of justice would be adversely affected by disclosure include adverse effects on the course of justice in the particular case, such as that it would be unfair to give the requester access to the public authority's legal advice without the public authority having the corresponding benefit.... However, it would of course have to be borne in mind.... that the exception is only engaged if the course of justice would be adversely affected.³

18. The Tribunal has considered the general principles of accountability and transparency involved in this appeal. Disclosure could help the public understand the legal basis for the Council's actions but there are other legal routes for pursuing that course of action. The Appellant is not precluded from taking those routes although he states that he does not wish to use them.

² *WR* was a successful appeal against a decision made by the First Tier Tribunal which included the Information Rights Judge who is part of the panel for this appeal.

³ *Ibid* [54].

19. What does not follow, however, is that simply because the Appellant has been a part-contributor to the funding for the obtaining by the Council of the legally privileged information - because he is a Council Tax payer – that he is entitled to see it as of right.
20. At its most extreme that would preclude any local council from obtaining any legal advice without automatically having to share it – stripped of the protection of advice provided professionally and in confidence – with its local community.
21. The reality is just the opposite. The Council is entitled, as is any person, to seek and obtain legal advice. Simply because it is a public authority does not mean that it is unable to rely on legal professional privilege, nor that the in-built weight to protecting privilege should be lessened.
22. The fact that the Appellant states that he is not proposing or threatening to litigate against the Council is not a relevant factor. When information is disclosed under FOIA and EIR it is deemed to be disclosed to the public generally and there is settled case law, referenced by the Commissioner in his Response, to confirm that position.
23. Having considered the withheld information carefully the Tribunal is satisfied that the public interest in maintaining the legal professional privilege in respect of it substantially outweighs the public interest in disclosing it.
24. It follows, therefore, that this appeal must fail.
25. Our decision is unanimous.
26. There is no order as to costs.

Robin Callender Smith
Judge
12 March 2014