



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

EA/2012/0083

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50427885
Dated: 20 March 2012**

Appellant: MR AND MRS G. WILLIAMS

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: THE LOCAL GOVERNMENT OMBUDSMAN

Third Respondent: SANDWELL METROPOLITAN BOROUGH COUNCIL

Date of hearing: 11 October 2012

Date of Decision: 24 October 2012

Before

**Annabel Pilling (Judge)
Darryl Stephenson
and
Nigel Watson**

Subject matter:

Environmental Information Regulations 2004
Exceptions, Reg 12 – Course of justice (5)(b)

Representation:

For the Appellant:	Mr and Mrs G. Williams
For the Respondent:	Helen Davenport
For the Second Respondent:	Tony Child
For the Third Respondent:	Paul Nicholls QC

Cases:

Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48

Bellamy v Information Commissioner and Department for Trade and Industry (EA/2005/0023)

R v Derby Magistrates Court, ex parte B [1995] 4 All ER 526,

Department for Business Enterprise and Regulatory Reform v O'Brien and The Information Commissioner [2009] EWHC 164 (QB)

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice of 20 March 2012.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 20 March 2012.
2. The Decision Notice relates to a request made by the Appellants on 12 September 2011 for a copy of a legal advice provided to the Local Government Ombudsman (the 'LGO') by Sandwell Metropolitan Borough Council (the 'Council') during the course of an investigation by the Ombudsman of a complaint made by the Appellants concerning the Council.
3. The Appellants live in a Smoke Control Area. They have raised complaints to the Council about neighbours using wood-burning stoves and wanted the Council to take action using its legal powers to deal with their concerns. In particular, the Appellants wanted the Council to make use of its powers under section 79 of the Environmental Protection Act 1990 (the 'EPA') to deal with a statutory nuisance, namely "fumes and

gases emitted from premises so as to be prejudicial to health or a nuisance”¹.

4. The Council’s position was that it could not make use of its powers under the EPA because section 79 did not apply to smoke that was emitted from chimneys in a private dwelling in a smoke control area. The Council said that the powers available to it were those in the Clean Air Act 1993 (the ‘CAA’)².
5. The Appellants disagree with this interpretation and consider that the Council had been given incorrect legal advice that they had no power under the EPA to deal with their complaints. The Appellants maintain that the smoke emissions do not amount to “smoke” but “fumes and gases”. In the course of dealing with the Appellants’ complaint, the Council took independent legal advice in relation to its powers. It did not provide a copy of that advice to the Appellants (declining a request on the basis of regulation 12(5)(b) Environmental Information Regulations 2004 (the ‘EIR’)).
6. Unhappy with the Council’s lack of action, which they believe is based on flawed legal advice or contrary to legal advice, the Appellants complained to the LGO. The LGO asked the Council whether it had taken legal advice in relation to the question whether it could take action under the EPA and, if so, to provide a copy to the LGO.
7. The Council did provide a copy to the LGO, but requested that the LGO keep it confidential.
8. On 12 September 2011 the Appellants asked the LGO to disclose the legal advice which had been provided to it by the Council. The LGO declined to do so, on the basis of exemptions under the Freedom of Information Act 2000 (the ‘FOIA’). In particular, the LGO refused to

¹ Section 79(1)(c) EPA.

² (There are a number of exceptions to and limitations on the “apparently simple” provision of the EPA and are regarded as reflecting the desire of Parliament to avoid duplication of other control regimes.)

disclose the legal advice on the basis of section 42 of FOIA (legal professional privilege).

9. The Appellants complained to the Commissioner about the outcome of the request.
10. The Commissioner commenced an investigation, during which he asked the LGO to confirm, among other things, the access-regime under which the request had been processed, the relevant exemption or exception being relied upon to withhold the information requested, and the arguments supporting the application of the cited exemption or exception.
11. The LGO noted that the request for information had been considered under both FOIA and the EIR. She argued that the requested information would be subject to the exception provided by regulation 12(5)(d) EIR (confidentiality of proceedings).
12. The Commissioner concluded that the information is “environmental” within the definition at regulation 2(1)(c) EIR. The information requested relates to the independent legal advice obtained by the Council on the question of whether it should seek to control emissions from a chimney of a private dwelling in a smoke control area through either the use of a statutory nuisance regime, namely the Environmental Protection Act 1990, or under the Clean Air Act 1993, and is therefore information on a measure likely to affect the elements and factors in regulations 2(1)(a) and (b).
13. The Commissioner found that the exception in regulation 12(5)(d) had been misapplied on the basis of regulation 12(9), excluding information on emissions from the exception in regulation 12(5)(d).
14. After taking into account his responsibilities as the regulator of the EIR, the Commissioner concluded that the information requested fell within the exception in regulation 12(5)(b) (course of justice); it is covered by

legal professional privilege, its disclosure would adversely affect the course of justice and the public interest in maintaining the exception outweighed the public interest in disclosure. He concluded that the LGO was entitled to withhold the information.

The Appeal to the Tribunal

15. The Appellants appeal to this Tribunal. In the Notice of Appeal, the Appellants advanced a number of arguments challenging the findings of the Commissioner that i) the exception in regulation 12(5)(b) EIR was engaged, and ii) that even if it was engaged, the Commissioner erred in his assessment of the public interest and should have concluded that the public interest in maintaining the exception was outweighed by the public interest in disclosure.
16. The Tribunal joined the LGO and, later, the Council as Second and Third Respondents respectively.
17. Within their additional submissions (dated 8 June 2012), their Replies to the Responses of the Commissioner, the LGO and the Council, and additional written submissions (dated 30 September 2012) the Appellants have repeated or advanced a number of points. They have also complained that the LGO and the Commissioner did not deal comprehensively with each and every one of the points raised during their investigations of the Appellants complaints. As the points and arguments have been advanced in several documents, without numbered paragraphs or other identifying markers, we do not consider that it is possible, proportionate or necessary for us to compile a list of every single point and address in our decision our conclusion in respect of each. We have considered all the arguments advanced and have read all the documents provided to us by the Appellants. This decision reflects the reasons for our conclusion.
18. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and additional written submissions from the parties.

We were also provided with a copy of the legal advice which was not provided to the Appellants as to do so would defeat the purpose of the appeal. The Commissioner provided a Bundle of Authorities, mainly First Tier Tribunal decisions dealing with the issue of legal professional privilege. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

19. As the LGO observed, it is not for her, or for us, to decide on the correct definition of the emissions about which the Appellants complained to the Council. There are other avenues open to the Appellants to challenge the course of action taken by the Council. We are concerned solely with whether the Commissioner erred in concluding that the legal advice is subject to the exception provided in regulation 12(5)(b) EIR and that the public interest in maintaining the exception outweighs the public interest in disclosure.

20. There is no dispute that the legal advice falls within the definition of “environmental information” and that the EIR apply.

Is regulation 12(5)(b) EIR engaged?

21. The Appellants challenge this finding. They submit that the EIR has no exception for legal professional privilege and that regulation 12(5)(b) EIR is not the same as the exemption provided for by section 42 of FOIA.

22. The Commissioner agrees to this extent; the exception in regulation 12(5)(b) is similar but not identical to that provided in section 42 of FOIA. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

23. This Tribunal has concluded in a number of cases that the “course of justice” covers legal professional privilege as the exception exists, in part

to ensure that there should be no disruption to the administration of justice. We agree. Disclosure of material protected by legal professional privilege would deprive the Council of the very thing it was obtaining – confidential legal advice. This is a fundamental element in the administration of justice, based on the need to obtain legal advice and assistance, and to ensure that all things reasonably necessary in the shape of communication to the legal advisers are protected from production or disclosure in order that legal advice may be obtained safely and sufficiently. The circumstances in which legal professional privilege can be claimed have been analysed fully in Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48.

24. We do not need to review the authorities, starting with the line of cases beginning with Bellamy v Information Commissioner and Department for Trade and Industry (EA/2005/0023) on this well documented issue. We agree with the Commissioner that disclosure of information that is subject to legal professional privilege would have an adverse effect on the course of justice simply through the weakening of this important doctrine. This would, in turn, undermine a legal adviser's capacity to give full and frank advice and discourage the seeking of legal advice. Disclosure would inhibit the ability of the Council to make its own decision and consider its own position with the benefit of legal advice. We therefore conclude that the Commissioner was entitled to find that the legal advice is covered by legal professional privilege, that disclosure of the legal advice would adversely affect the course of justice and that therefore the exception in regulation 12(5)(b) EIR is engaged.

Waiver of legal professional privilege.

25. The Appellants submit that the legal advice has lost its privilege as a result of the disclosure of the information because i) the substance of the legal advice was disclosed to them by the LGO during the course of her investigation of their complaint, ii) there was disclosure of the substance of the advice to the Appellants' neighbours (who have also complained to

the Council about the use of the wood-burning stoves) and iii) the Council disclosing the advice to the LGO in the first place, and confirming to the LGO that:

“4. With regard to the use of the Environmental Protection Act 1990 to control smoke emissions, the definition of ‘statutory nuisance’ includes, in section 79(1)(b) ‘smoke emitted from premises so as to be prejudicial to health or a nuisance’.

However, section 79(3) states that:

‘Subsection 79(1)(b) above does not apply to-

- i. smoke emitted from the chimney of a private dwelling within a smoke control area.’*

I can confirm that the Council has taken independent legal advice on this point and is satisfied that this is the correct interpretation of the law.”

26. The advice was provided to the LGO investigating the Appellants’ complaint on the expressed condition that it was kept confidential. The Commissioner concluded that privilege was not lost as a result of the restricted disclosure in these circumstances. We agree with that finding.

27. The Commissioner does not agree that there has been disclosure of the substance of the legal advice that would amount to a waiver of legal professional privilege. The summary of the advice that was provided to the Appellants and their neighbours did not reveal the full advice or anything approaching that. Having considered the legal advice which was provided to us, we agree with that finding.

28. The Appellants further argue that the substance of the legal advice has been revealed in the Council’s letter to them dated 17 May 2012. We agree with the Commissioner that this letter is irrelevant to our considerations as it postdates the request which is the subject of this appeal. We must consider the issue of whether legal professional privilege had been lost or waived at the time of the request or, at the

latest, at the time for statutory compliance, however artificial that may appear with the passage of time.

Misrepresentation of contents of legal advice

29. The Appellants stress that their “central point” is whether the legal advice has, or has not, been misrepresented by the Council, the LGO and the Commissioner.

30. As this appeal concerns the request made to the LGO, the issue for us is whether the LGO has misrepresented the contents of the legal advice. If so, then this would be an important factor to take into account in assessing the balance of the public interest as it would carry greater weight in favour of disclosure.

31. The Appellants refer to a letter from the Council dated 17 May 2012 which they submit “completely reverses [the Council’s] position”. They submit this is an important factor to consider when assessing whether the contents of the legal advice have been misrepresented.

32. As we have indicated above, we agree with the Commissioner that this letter cannot form part of our deliberations as we must consider the balance of the public interest at the time of the request or, at the latest, at the time for statutory compliance, however artificial that may feel with the passage of time.

33. The Appellants also refer to an email dated 29 March 2012 from the Council to Defra which they submit demonstrates again that the Council is misapprehending the contents of the legal advice. Again, this is irrelevant to the request which is the subject of this appeal.

34. The Appellants have set out in a number of their written submissions to the Tribunal the basis for their submission that the Council and the LGO have misrepresented the contents of the legal advice.

35. We have looked at this issue carefully and have considered all the documentation before us in relation to this, including the letters provided by the Appellants and the legal advice itself. It appears to us that the Appellants disagree about the characterisation of the emissions from the wood-burning stoves at the neighbouring properties as “smoke” rather than “fumes and gases” and, as a result, have, in our opinion, misconstrued the information conveyed to them in certain letters.

36. We have considered the legal advice in question. We do not consider that the LGO, or indeed the Council, has misrepresented the contents of that legal advice. It may be their choice of language does not accord with that employed by the Appellants. The definition of the emissions from the wood-burning stoves at the neighbouring properties as “smoke”, “dark smoke”, “malodorous smoke”, “fumes and gases”, or any other choice of words, is not for us. The Appellants can challenge the Council’s approach elsewhere.

The public interest in favour of disclosure

37. The Appellants submit that the Commissioner failed to give weight to the presumption in favour of disclosure.

38. They submit that the Commissioner failed to take into account all the factors in favour of disclosure, in particular:

- i) that there was misrepresentation of the contents of the legal advice;
- ii) that the Commissioner failed to specifically deal with each point contained in their letters to him, suggesting bias, and;
- iii) that disclosure is in the public interest because of the possibility of the production of carbon monoxide in wood-burning stoves which may result in death.

39. In the Decision Notice, at paragraph 38, the Commissioner indicated that he *“will always attach some weight to the general principle of transparency. Ultimately, transparency should equate to accountability and may help the public to trust and participate in the decisions taken by a public authority.”*

40. He considered that the contents of the disputed information mean that there is a particular public interest in the information which goes beyond the general principle of transparency in the following ways:

- i) that although the advice was obtained in response to a localised situation, it addresses the broader issue of how relevant legislation should be applied;
- ii) the monitoring of emissions by the Council will have a direct impact on the well-being of some of the population it serves;
- iii) it is likely that the legal advice will shape, in part, the Council’s approach to controlling emissions from private dwellings in the future;
- iv) there is a significant level of local interest in knowing more about how the Council intended to tackle issues concerning emissions of this type.

41. As the Appellants point out, the Commissioner did not refer to the obligation under regulation 12(2) for a public authority to apply a presumption in favour of disclosure. The Commissioner submits that he considered this obligation by his wording of paragraph 38. It would have been useful for the Commissioner to specifically refer to regulation 12(2) and we have certainly had that obligation in mind when considering the balance of the public interest in this case.

42. We conclude that the Commissioner properly identified the factors in favour of disclosure, did not demonstrate “bias” and did specifically have regard to the impact on the well-being of the local population in respect of monitoring and controlling emissions from private houses.

The public interest in maintaining the exception

43. The Appellants submit that the Commissioner gave too much weight to the public interest in maintaining legal professional privilege and elevated it to the status of a presumption against disclosure
44. We agree with the Appellants that there is not and should not be any automatic presumption against disclosure for information which carries legal professional privilege. By making regulation 12(5)(b) EIR (and section 42 of FOIA) subject to balancing the public interest in disclosure, Parliament clearly rejected the view expressed in some judgments that the public interest in obtaining legal advice in confidence automatically prevails over almost any other interest. Parliament has done exactly what the House of Lords in R v Derby Magistrates Court, ex parte B [1995] 4 All ER 526, per Lord Taylor, said was required to change the absolute nature of legal privilege, it has added a public interest balancing exercise.
45. We have reviewed the previous decisions of the Tribunal that have been provided to us, although we do not consider it necessary or helpful to analyse them in this Decision. We have also read carefully the judgment of Wyn Williams J in Department for Business Enterprise and Regulatory Reform v O'Brien and The Information Commissioner [2009] EWHC 164 (QB) and consider that where it is established that legal professional privilege attaches to a document there is an in-built public interest in non-disclosure which itself carries significant weight.
46. The proper approach for the Tribunal is to acknowledge and give effect to the significant weight to be afforded to the exception; ascertain whether there are any particular or further factors which point to non-disclosure and then to consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) are of equal weight at the very least.

47. The Appellants also submit that the Commissioner should have given less weight to age of the advice.

48. In general, the Commissioner considers that the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of the decision making process. Commensurately, the harm to the privilege holder (here the Council) is likely to diminish with the passage of time, which *could* give weight to arguments in favour of disclosure.

49. The “older” the advice may mean the less importance or weight attached to it, but generally, without more, the public interest in disclosure would still be outweighed by the public interest in protecting the ability of a public authority to obtain that advice in the first place. The definition of “recent” will vary according to the reasons for a public authority seeking the advice and the context in which a request for information was made. On the facts of this case, the advice was produced a few months before the request to the LGO was made and at a time when the advice it contained was clearly “live”, and at a time when the request to the Council for the same advice had been refused. In our opinion this carries more weight in favour of maintaining the exception than in disclosure of this legal advice.

Balance of the public interest

50. The question of whether the public interest in maintaining the exception outweighed the public interest in disclosing the information is therefore one to be addressed and determined by the Tribunal, based on all the relevant circumstances of the case and all the evidence before us. We consider the following to be principles of general application:

- (a) Information held by public authorities must be disclosed upon request unless EIR provides an exception for it to be withheld.

- (b) There is express provision under EIR that requires a public authority to apply a presumption in favour of disclosure.
- (c) In the case of an exception being engaged, information may only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosure of the information. If the competing interests are equally balanced then the public authority, must disclose the information.
- (d) There is an assumption built into EIR (and FOIA) that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest and the strength of competing interests must be assessed on a case-by-case basis.
- (e) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exception may diminish over time.
- (f) In considering the public interest factors in favour of maintaining the exception, the focus should be upon the public interests expressed explicitly or implicitly in the particular exception at issue.
- (g) The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.

51. It is incumbent on us to give significant weight to the public interest against disclosure where the information is covered by legal professional privilege.

52. Weighing up the factors in favour of disclosure, as identified above, we do not consider that they outweigh the significant public interest in maintaining the exception.

Other matters

53. The Appellants have made a number of complaints about the Council, the LGO and the Commissioner in respect of their communications and dealings in general with the Appellants. These complaints go beyond the jurisdiction of this Tribunal. These include a submission that the LGO has a separate obligation to disclose the information under the Local Government Act 1974. This Tribunal is concerned only with the request for disclosure of the legal advice under the EIR. The Appellants may have an alternative course of action elsewhere.

Our conclusion:

54. The legal advice was protected by legal professional privilege.

55. We consider it well settled that legal professional privilege falls within the exception in regulation 12(5)(b) EIR and therefore that the exception is engaged.

56. The public interest in maintaining that exception outweighs the public interest in disclosure of the legal advice.

57. We therefore refuse this Appeal.

58. Our decision is unanimous.

[Signed on original.]

Annabel Pilling

Judge

24 October 2012