



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0077

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50557416

Dated: 23 February 2015

Appellant: Rosemary Hewlett

Respondent: Information Commissioner

Public Authority: Beccles Town Council

Heard at: Fox Court, London

Date of hearing: 16 September 2015

Date of decision: 12 November 2015

Before

Angus Hamilton

Judge

and

Henry Fitzhugh

and

Melanie Howard

Subject matter: s 42 (Legal professional privilege) Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal for the reasons given below and consequently substitutes the original Decision Notice with the Decision Notice set out below.

SUBSTITUTED DECISION NOTICE

Freedom of Information Act 2000 (FOIA)

Date: 18 November 2015

Public Authority: Beccles Town Council
Address: Town Hall
The Walk
Beccles
NR34 9AJ

Complainant: Rosemary Hewlett

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 23 February 2015.

Action Required

Beccles Town Council is to provide a copy of the information requested by the Ms Hewlett in her communication of 16 July 2014 with the exception of the map or plan which has already been provided.

Beccles Town Council must take these steps within 35 calendar days of the date of this substituted decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Dated this 18th day of November

Signed

Angus Hamilton DJ(MC)
Tribunal Judge

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REASONS FOR DECISION

Introduction

- 1 On 16th of July 2014 the appellant wrote to the public authority in the following terms:

'Someone did kindly pick up a map for me this morning which was supposed to show the area that is now being registered as charitable land. However, the red line showing the area doesn't show up so it is not possible to see what areas are marked. The blue and red bit which is the sports ground shows up but not the other. Is it possible to have a copy with the red line showing please as by the black line I see it looks as if the Common is excluded and I thought the mayor did say that all lands in the Charter do now have to be registered. The quay doesn't seem to appear on the map at all. Members of the public did not get copies of the other documents mentioned on the agenda, i.e. barrister's opinion, advice, map and statutory declaration from Waveney District Council. Is it possible to have copies of these too please?'

- 2 The council responded on 25th of July 2014 and provided a copy of the plan but did not provide the other documents mentioned on the agenda as it said they were covered by legal professional privilege.
- 3 On 28 July 2014 the appellant asked the council to check whether the response was correct as she believed that she was entitled under FOIA to have copies of the other documents. The council responded the same day stating that the information from the QC was exempt as it was classed as 'a legal privilege for the council'.
- 4 Following the intervention of the Commissioner the council provided an internal review response on 17 November 2014. It said that the barrister's opinion in respect of Beccles was exempt under section 42 of FOIA. It

also said that the document could be viewed outside of FOIA at the council's offices provided a waiver was signed.

5 The appellant initially complained to the Commissioner on 7 October 2014 but after the formal internal review response she confirmed that she was still unhappy with the response and said she was still seeking disclosure of the Barrister's opinion, statutory declaration and advice. She explained that unofficial copies had been put through her letter box but she wanted to be provided with official copies as she believed that they should be made available to the public.

6 S. 42 of FOIA is a qualified exemption. For all qualified exemptions in accordance with s2(2) of FOIA it is necessary to consider not only whether the exemption is engaged but also whether:

'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

The Tribunal has described this as the 'public interest balancing exercise'.

7 In a Decision Notice dated 23 February 2015 the Commissioner determined that the legal professional privilege exemption had been appropriately claimed in relation to the barrister's opinion and the statutory declaration and furthermore determined that the public interest balancing exercise in section 2(2) of FOIA favoured upholding the exemption in s. 42 rather than requiring disclosure. At this stage the Commissioner appears to have overlooked the request for the disclosure of 'advice' and only realized his error at a late stage during the appeal proceedings. The Commissioner subsequently submitted that the same argument applied to the 'advice'.

The appeal to the Tribunal

8 The appellant submitted an appeal on 19 March 2015. The appellant

raised a significant number of issues. The appellant asserted that the confidentiality of the barrister's advice had been lost when passages of the opinion were officially read out at a council meeting. The appellant further asserted that confidentiality in relation to the opinion and statutory declaration were lost when the items were posted through her door and when she further disseminated them. The appellant also, at least by implication, asserted that the public interest on balance favoured disclosure over maintaining the exemption. The appellant referred to the fact that the land in question was owned in trust for the people of Beccles who should therefore have disclosed to them all the documentation feeding into decision-making in relation to that land. The appellant also expressed concern that the council were acting contrary to the legal advice that they had received and that the only way of checking this was to have sight of the barrister's opinion.

- 9 The Tribunal was concerned that this was a rather sterile and academic appeal and not a terribly fruitful use of public resources since the majority of the documents in relation to which disclosure was sought were now in the appellant's possession. The Tribunal acknowledged however that the appropriate point in time at which to consider whether the claimed exemptions applied was the time when the appellant first sought disclosure and the compelling inference was that this was before the appellant received, from an anonymous source, copies of the sought documents. The Tribunal also acknowledged that one of the sought items, namely the 'advice' had never been provided to the appellant.

The questions for the Tribunal

- 10 The Tribunal concluded that the questions to be answered were, first, whether the claimed exemption had been claimed appropriately (was 'engaged') and, secondly, the Tribunal had to consider whether the public interest balancing exercise favoured upholding the exemption or favoured disclosure.

Evidence

- 11 All parties have agreed that this matter should be considered 'on the papers' only and we heard no live evidence or oral submissions. No parties or representatives attended the hearing.

- 12 We considered, from the Appellant, the Notice and Grounds of Appeal and supporting documents and the appellant's final submissions. We considered, from the Commissioner, the Decision Notice, the response to appeal and the final submissions. There were no submissions from the public authority and the Tribunal understood that they had not been joined as a party to the proceedings. The Tribunal also considered the 'Closed Bundle' which contained the items in relation to which disclosure had been refused.

Conclusion

- 13 The Tribunal considered first whether legal professional privilege (LPP) had been appropriately claimed. The Tribunal noted the appellant's assertions as to the loss of privilege as set out in paragraph 8 above. The Tribunal agreed with the Commissioner's submissions on these points noting that the reading out of the advice at the council meeting was at most a partial disclosure of that advice. In relation to the disclosure of the documents to the appellant the Tribunal noted that this was not a disclosure which was sanctioned by the public authority and it would not be appropriate to hold that the public authority had consequently waived LPP. To determine otherwise, the Tribunal felt, would have the consequence that a stolen privileged document would lose its privileged nature through the unlawful act of stealing. In any event the disclosures to the appellant occurred after the request by the appellant to the public authority and, as stated above, the time for consideration of the applicability of the claimed exemption was time that the initial request was made.

- 14 However, in relation to the public interest balancing exercise the Tribunal was unanimous that the public interest favoured disclosure rather than the maintenance of the exemption.
- 15 The Tribunal noted and accepted the Commissioner's submissions that 'there is a strong inherent public interest in maintaining LPP' – **'It is important (in the interest of the public whom they serve) for public authorities to be able to conduct a free and frank exchange of views with their legal advisors. Any disclosure of privileged material may inhibit a public authority from seeking advice in the future, or from disclosing all relevant material to its legal advisor when it does so.'** Commissioner's Response at p13.
- 16 The Tribunal was however influenced by the following factors:

The history of the land in question is labyrinthine and dates back to the (first) Elizabethan era. The Commissioner's Response (which has not been challenged on these particular points) records that - **On 2 July 1584 the Corporation of Beccles Fen (the 'corporation') was incorporated by a charter of Elizabeth I. The Charter granted land known as Beccles Common and Fen to the corporation on condition that it use it for the benefit of the inhabitants of Beccles and other 'pious and charitable purposes in the town'. The land was thus held by the corporation as trustee of a charitable trust. The original charter did not contain a map of the trust land. The charter was confirmed by a further charter of James I made on 19 May 1605 which estimated that the trust land amounted to some 1400 acres. As a result of the Municipal Corporation Act 1835, Beccles Borough Council succeeded the corporation as trustee. By operation of the Local Government Act 1972 and legislation made pursuant to that act Beccles Town Council succeeded Beccles Borough Council and Waveney District Council was formed. Although Beccles Town Council and its**

predecessors have always held the trust land on trust it appears that over the years this was forgotten. The trust land held by Beccles Town Council came to be regarded as its own property. Roughly half of the original 1400 acres was sold or leased at one time or another. But at least one parcel of land – the sports complex – was leased to Waveney District Council although there remains a question as to whether Waveney District Council in fact owns the freehold of this land.

The Tribunal considered that it was a highly relevant factor that the land in relation to which the public authority had sought advice was not land owned by the public authority but land held in trust for the inhabitants of Beccles. The advice received was therefore about a public asset – one in which the people of Beccles had a clear and direct interest rather than, for example, an office block owned by the council where the public interest was far more indirect. The Tribunal considered that the Commissioner was far too dismissive of this point. The Commissioner states at paragraph 53 of his Response: **‘It is fundamental to the operation of local authorities that they act in the interests of the inhabitants of their area. They only hold property (under any type of arrangement) and perform their functions in furtherance of this over-arching purpose. If it were a decisive factor in favour of disclosure that the public were the ultimate beneficiaries of the subject matter of the request, then the public interest would always favour disclosure’.**

The Tribunal felt that this analysis was flawed in two respects. First the Commissioner failed to give sufficient weight to the very particular arrangement for the land in question – that it was held in trust for the inhabitants of Beccles – and failed to distinguish the land from other property that might be owned directly by the council. Secondly the Tribunal felt that the Commissioner was wrong to assert that **‘It is fundamental to the operation of local**

authorities that they act in the interests of the inhabitants of their area' in a case where even on the Commissioner's own account of the history of the land there was clear evidence of the local authority failing to act in the interests of the inhabitants of the land. On the Commissioner's own account various public authorities 'forgot' about the trust, started to treat the land as their own asset and sold parts of it off. The Tribunal felt that this constituted clear evidence of a public authority failing 'to act in the interests of the inhabitants of their area'.

The Tribunal's analysis on this last point is also relevant to a further factor which influenced the Tribunal's decision on the public interest balancing test. The Commissioner asserts (paragraph 55 of Response) that 'there is nothing to suggest that Beccles Town Council has acted inappropriately'. The Tribunal considered that while this might be largely true in relation to the public authority in its current form and in relation to the loss of the trust land, there was clear evidence of general inappropriate behavior by the public authority in its previous incarnations (and possibly in its current form too) in relation to the loss of trust land (the Tribunal were not provided with any dates of any relevant land transfers and so it was not possible to attribute responsibility to any particular form of the public authority). The Tribunal felt that such clear inappropriate behavior should be subject to openness and scrutiny and not secrecy. The documents in relation to which the appellant sought disclosure fell into the category of documents which should be the subject of scrutiny. The Tribunal also noted on this point that, in relation to the public authority in its current form, the Charity Commission had had to intervene in March 2000 to draw the attention of the council to the continuing existence of the charitable trust and to require the council to hold the income from the trust land separately from its other income, The Tribunal considered that the fact that the council was failing to do so was also indicative of the public authority failing to act in the interests of the local

population.

The Commissioner also states in his Response (paragraph 57) **‘that the documents are only likely to be of interest to the residents of a small town of around 14,000 people’** The Tribunal felt that 14,000 was rather a large number to apply the qualifier ‘only’ to. The Tribunal were also unaware of any authority (and noted that the Commissioner cited none) which suggested that there were a minimum number of people who might be interested in disclosure before a genuine public interest in disclosure could be established.

17 In conclusion therefore, the Tribunal, whilst acknowledging and embracing the principle that there is a strong inherent public interest in maintaining LPP, considered that this was one of those rare and exceptional cases where the public interest favoured disclosure. As a general proposition there must be such cases otherwise FOIA would have made LPP an absolute and not a qualified exemption.

18 This decision was unanimous.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 12 November 2015