



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

Appeal Reference: EA/2021/0039V

Heard via the CVP platform on 30 July 2021.

Before

Judge Stephen Cragg Q.C.
Ms Susan Wolf
Mrs Suzanne Cosgrave

Between

Ivan Murray-Smith

Appellant

And

The Information Commissioner

Respondent

The Appellant represented himself

The Commissioner was not represented

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. Mr Murray-Smith joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 252 pages, a skeleton argument from the Appellant and a closed bundle.

INTRODUCTION

4. On 21 January 2020, the Appellant requested information from Oxford City Council (the Council) in the following terms: -

I refer the council to FOI response 8889, where the council confirmed that it prosecuted 1 individual in October 2019. The council has also confirmed it issues around 10,000 excess charge notices a year, even though by virtue of regulation 7(1) above, non-payment of an excess charge notice is not an offence which may be pursued in a Civil Enforcement Area.

Of course, the council may hold information that confirms regulation 7(1) does not apply or is for some reason not relevant to its car park enforcement activities. In light of this I now request the following information:

- 1) What legal basis does the council have to issue ECNs, contrary to the provisions of regulation 7(1)?
- 2) What legal basis does the council have to pursue criminal prosecutions for parking contraventions, contrary to the provisions of regulation 7(1)?

5. On 18 February 2020 the Council provided the following information in regard to each part of the request: -

- 1) The Council relies on The City of Oxford (Off-Street Parking Places) Order 2011 (as amended) and Part IV sections 32 – 35 of the Road Traffic Regulation Act 1984, with the consent of the Oxfordshire County Council in

accordance with section 39(3) to issue excess charge notices. The Council is of the view that The City Council's off street car parks were excluded from The Road Traffic (Permitted Parking Areas and Special Parking Areas) (City of Oxford and Parish of North Hinksey) Order 1996, therefore regulation 7(1) has no effect in relation to them.

Please see attached The City of Oxford (Off Street Parking Places) Order 2011.

2) In the event of any non-compliance and contravention of The City of Oxford (Off-Street Parking Places) Order 2011, the Council has authority under Section 35A (1) of the Road Traffic Regulation Act 1984 to pursue criminal prosecutions.

6. The Appellant requested an internal review asking for any information held forming the basis of the response to request item (1) specifically in relation to the exclusion of off-street car parks from the 1996 Traffic Regulation Order ("TRO"). The Appellant asked where, within the 1996 Order, information concerning the exclusion relied on by the council can be found and whether the council holds any further information recording its reliance on this exclusion.
7. The council wrote to the Appellant on 17 March 2020. It upheld its original response, however the Council also provided further information which it stated was an explanation of the Council's position regarding its enforcement powers for parking contraventions, which it is worth setting out in full: -

The Council considered the correct use of enforcement powers for its off-street car parks in 2015. It was concluded that the City Council's off-street car parks were excluded from the County Council's 1996 submission to the then Department of Transport (DoT) which led to the 1996 Order and therefore they remain subject to 'criminal' enforcement by way of section 35A(1) Road Traffic Regulation Act 1984 (RTRA 1984).

Legal advice was obtained which informed and supported this conclusion. This advice is subject to legal professional privilege and exempt from disclosure under section 42(1) of the Freedom of Information Act 2000. I am not willing to waive that privilege at this time and I consider the general public interest in maintaining communication between client and legal advisor overrides any public interest in disclosing the advice in this case.

I can say that looking at Part II of Schedule 3 to the 1996 Order. This part is entitled "Modifications to the Road Traffic Act 1991 ("the RTA"). The relevant part of the 1996 Order reads as follows:

- (1) Schedule 3 (to the RTA) shall be amended as follows.
- (2) In paragraph 1(4) paragraph (ab) shall be omitted

Paragraph 1(4) (ab) of Schedule 3 to the RTA provides as follows:

“While an order under sub-paragraph (1) above is in force (an order introducing DPE - “Decriminalised Parking Enforcement”), the following provisions shall cease to apply in relation to the permitted parking area designated by the order-

(ab) section 35A(1) of the (“Road Traffic Regulation”) Act of 1984 (offences), so far as it relates to the contravention of, or non-compliance with any provision of any order made under section 35 of that Act (use of parking spaces) applying in relation to stationary vehicle”

The City Council does rely on section 35A (1) of the RTRA 1984 in order to enforce compliance with the conditions upon which its off-street car parks are used. The effect of Part II of Schedule 3 to the 1996 Order is to leave intact criminal enforcement under section 35A (1). The clear intention was to exclude off-street car parks from Decriminalised Parking Enforcement. This fact is recognised in a letter of 16th October 1996 from the then Minister for Railways Roads and Local Transport to the County Council indicating his regret that the City Council was not prepared to allow its off-street car parks to be included in the 1996 Order. A copy of this letter is held by the Council and is attached.

Further support for this position is provided in The Road Traffic (Permitted Parking Area and Special Parking Area) (County of Dorset) (District of West Dorset) Order 2002 (now repealed) which contained a proviso identical to Schedule 3 to the 1996 Order and its explanatory note provided:

“It also modifies Schedule 3 to the Road Traffic Act 1991 in relation to the designated area to provide that parking offences in off-street car parks will not be decriminalised under this order”

This explanatory note, provided in an Order made by the DoT some six years later than the 1996 Order, does appear to clarify the effect of excluding the operation of the RTA and preserving section 35A (1) of the RTRA 1984. A copy of the Dorset Order is no longer held by the Council.

8. In response to questions the Council carried out a second internal review on 29 October 2020 in which it answered two questions: -
 - (a) Does the Council hold any further disclosable information in relation to the conclusion it reached on the question of parking enforcement in its off street car parks as set out in the review?
 - (b) Was the Council entitled to withhold the legal advice on the basis of section 42(1)?

9. In relation to (a) the Council advised that the information communicated had been based on the recollection of officers who were involved with or aware of the matter when the Council considered the question of parking enforcement, rather than being recorded information held by the council. It advised that the parking enforcement question had been considered in relation to a formal complaint (the 'Formal Complaint') made by an individual. The Council held some recorded correspondence in terms of its response to the Formal Complaint which is considered exempt from disclosure under sections 40(2) FOIA (personal information) and section 41 FOIA (information provided in confidence). However, it advised that the substance of the Formal Complaint correspondence that relates to the Appellant's FOI request, had been provided in its responses to the request and the internal reviews.
10. In relation to (b) the Council upheld its position to withhold the legal advice on the basis of section 42(1) FOIA.
11. The Appellant contacted the Commissioner on 4 June 2020 to complain about the way the request for information had been handled. Specifically, the Appellant was concerned as to whether the Council was correct when it says it does not hold any further information in scope of the request and whether it is entitled to rely on section 42(1) FOIA to withhold information.
12. In the subsequent decision notice of 12 January 2021, the Commissioner considered the scope of the case was to establish whether the Council had disclosed all of the information held in scope of the request, including whether the recorded correspondence which informed its position on parking enforcement is in scope of the request. The Commissioner also said she would consider whether the Council has correctly engaged the exception at section 42(1) FOIA. It is this last point which has become the focus of the appeal and upon which we concentrate below.

THE STATUTORY FRAMEWORK AND CASE LAW

13. 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.

14. In this case it is not in dispute that s42 FOIA applies to the requested information.

The Commissioner deals with the issue in the decision notice as follows: -

36. There are two categories of LPP, litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but where legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

37. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

41. The Commissioner has viewed the withheld information and is satisfied that it comprises legal advice that was sought by the council from a professional legal adviser. The information was communicated in the legal adviser's professional capacity and remains confidential therefore the privilege attached to the withheld information has not been lost.

42. The Commissioner is satisfied that the exemption at section 42(1) of the FOIA is engaged.

15. 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.

16. 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.

17. In paragraph 51, the High Court emphasised the fact that ‘it was not necessary to demonstrate any specific prejudice or harm from the specific disclosure of the documents 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.

18. Further, in *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted as follows in emphasising that the s42 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.

19. There is also the case of *Breeze v Information Commissioner and CPS* EA/2013/52 & 153 which, although it is an FTT case, rehearses some of the previous case law: -

50. It is well established that the public interest in withholding information covered by legal professional privilege is significant. The Upper Tribunal in *DCLG v IC and Robinson* [2012] UKUT 103 (AAC) [2012] 2 Info LR 43 considered the development of the doctrine of legal advice privilege, and the public interest rationale for protecting the confidentiality of legal advice:

37. The development of the doctrine of legal advice privilege, 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 parte 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 rest.”

20. The Appellant has also relied upon the First Tier Tribunal case of *Mersey Tunnel Users Association v Information Commissioner* EA/2007/0052. This case is not binding on us, but it does express some interesting points on the exemption and is a case where disclosure was directed: -

42. We accept, consistent with the earlier tribunal cases referred to above, the weight that must be given to legal professional privilege, but we have reservations about the full force of some of the points argued. We question whether a public official, concerned to see that his authority acted within the law and therefore seeking advice, would really be inhibited from spelling out the full picture for fear that publication might eventually ensue. We have certainly seen no evidence to that effect, and it would seem self-defeating from the client’s point of view. The very points that, on this argument, they might feel inhibited from revealing, are presumably the very points on which they most wish to seek advice. It is hard to see how an officer could be criticised, even if the weak points are later revealed, for seeking advice to help put them right... Nor can we see that any professional lawyer would temper their advice for fear of later publication: that would again be self-defeating, to both client and lawyer, to say nothing of the lawyer’s professional obligations.

43. We can see such reservations would be a factor in the context of litigation, anticipated or actual, if only because legal advice will often involve not just merits, but also tactical considerations; disclosure at a time when litigation is in prospect would upset the delicate balance, evolved by the courts over centuries, of fairness between adversaries. It would be wholly unfair if one side, a public authority, could be obliged to reveal their legal advice, while their private opponent was not.

45. We are left with the central argument of the inbuilt weight that must be given to legal professional privilege. Given the importance of the principle, it is perhaps surprising, at least to lawyers, that Parliament did not make the exemption an absolute one. But it has not, and we should be careful not to

erect a qualified privilege into, in practice, an absolute one, through deference to the importance of legal privilege...The public interest test balance, with its inbuilt weight in favour of maintaining the exemption, must be struck in the particular circumstances of each case. We are not persuaded that there will be a significant inhibiting effect from disclosure in this case; nor from the next case, nor from others that may follow. Each will have to be decided on its individual merits and disclosure will only occur if a heavy hurdle – the inbuilt weight - is overcome.

49. The context of this case seems significant to us in applying the public interest test. ...If it is permissible to differentiate between the weight given to privilege in different contexts – and we think it is, given that the balance must be struck “in all the circumstances of the case” – then a question of pure public administration, such as the one in this case, where no significant personal interests are involved (we discount the cost to the individual of any increase in tolls from the loan repayments: MTUA are a representative body) is at the opposite end of the spectrum of importance to, for example, legal advice in a criminal or childcare case.

THE DECISION NOTICE

21. The decision notice focusses on the public interest balance and concludes as follows:

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53. In this case, the Commissioner has considered those arguments favouring disclosure of the withheld information against the Information Tribunal’s previous decisions in respect of maintaining legal professional privilege. She has also given regard to the content of the withheld information.

54. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decisions. She gives some weight to those arguments.

55. The Commissioner understands the crux of the complainant’s case is that disclosure is required in order to establish whether the council’s approach to parking enforcement is unlawful. However, it is the Commissioner’s position that determinacy of the credibility of such accusations is beyond the remit of the FOIA.

56. The Commissioner considered the explanations given by the council, which it has stated were partially based on the legal advice and also on the advice of council employees. The Commissioner has no reason to doubt the council’s transparency on the issue and maintains that the FOIA is not an appropriate legal mechanism by which to debate whether the council has been lawful in its approach.

57. The Commissioner has considered the public interest arguments in favour of disclosure of the information withheld under section 42. She concludes that in general terms weight can be attached to transparency and accountability, and to public interest in knowing the quality of legal advice received and whether a council chose to follow or go against it. However in this case, the weight of these arguments when added together is not enough to outweigh the public interest arguments in favour of maintaining the exemption, such as the vital importance of the council being able to obtain free, frank and high quality legal advice without the fear of premature disclosure. The evidence presented is not sufficient to outweigh or override the inbuilt public interest in information remaining protected by LPP.

58. In view of the above, the Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42 of the FOIA outweighs the public interest in disclosing the information.

THE APPEAL AND RESPONSE

22. The Appellant's appeal concentrates on the public interest issues in relation to the disclosure of the legal advice. The Appellant argues that the public interest factors in favour of maintaining the exemption are not strong. The Commissioner has failed to explain how the Council will be prejudiced if disclosure is made. However, says the Appellant, the public interest in disclosure is very strong: -

- (a) In *Mersey Tunnel*, the fact that the public authority had been pursuing a settled course of action of questionable legality over many years was considered highly relevant to the public interest in disclosure (at paragraph 46).
- (b) The public interest in the present case is equally strong, if not stronger: The Council has been pursuing its criminal enforcement activities in respect of off-street parking for many years, potentially affecting a very large number of people and involving large sums of money levied as penalties. If those activities were unlawful, the Council has been engaged in illegality of the most serious type, and the public interest in disclosure is overwhelming so that the illegality may be exposed and stopped.
- (c) Even if the legal advice confirms that the Council has acted correctly, there is still a strong public interest in clarifying the matter.

- (d) In the event that the Council's description of its position thus far is misleading or impartial, that is a further factor in favour of disclosure.

23. The Appellant has supplemented his appeal with a skeleton argument for the hearing. He confirms that: -

The only information that is the subject of this appeal is the legal advice received by the Council relating to its power to issue excess charge notices to motorists who contravene traffic orders relating to off-street car parks and/or prosecute motorists who failed to pay such notices.

24. The skeleton argument shows that the Appellant is convinced that the Council is acting unlawfully and he says, 'I am unable to find any plausible explanation for the incongruence between the legal framework and the authority's course of conduct'.

25. The skeleton argument sets out the Appellant's legal argument relating to the Council's activities (about which the Appellant accepts we have no function to resolve). In brief, the Appellant's argument appears to be that although the Council did at one stage have powers to issue criminal fixed penalty notices in relation to off-street parking offences, these powers have been removed by provisions in the Traffic Management Act 2004. The Appellant refers to statutes, orders and regulations over a period back to 1991 to make his case. It is fair to say that from the Council's communications with the Appellant that it does not agree with this analysis. The Appellant comments that: -

While it is not the role of this tribunal to give a view as to whether my contentions about parking law are right, the tribunal is entitled to find that my suspicion of wrongdoing is plausible and reasonable (clearly if my suspicion were far-fetched or fanciful, the public interest in disclosure of the withheld information would be significantly weakened).

26. The Appellant argues that putting the legal advice into the public domain will mean: -

...it will then be a matter of legitimate public debate whether the council's position is lawful or not. There might be political pressure (both within and outside of the council) for the council to reconsider the matter, seek updated advice, or simply adopt decriminalised parking enforcement regardless of the legality of the previous approach.

27. The Appellant argues that whatever the legal advice says then it will be in the public interest for it to be disclosed. His case is that the greater the risk that disclosure might impede such free and frank exchanges between a person and their lawyer, the stronger the interest will be in maintaining the exemption.. The Appellant says that the Commissioner has failed to articulate how or why there will be an inhibiting effect in this case if disclosure is made. He argues that where there is no reason to believe that such an inhibiting effect would occur, then the admittedly strong in-built presumption will be weakened. He notes the Tribunal case law while the section 42(1) FOIA exemption comes with a strong in-built presumption in favour of maintaining the exemption, there is no need to show exceptional circumstances to justify disclosure.

28. The Appellant argues that the fact that the legal advice remains “live” is a fact that militates in favour of disclosure at least to the same extent that it militates against it, essentially on the basis that it will clarify the Council’s current position as soon as possible. He states: -

The Commissioner described the public interest in protecting the council’s ability to obtain free, frank and high-quality advice to be “vital”, but she is unable to answer this question: how would the provision of such advice actually be impaired in this particular case? How would the advice or the instruction to the lawyer have been different if the council had known at the time that it would be later disclosed under FOIA?

THE HEARING

29. At the hearing the Appellant represented himself and neither the Commissioner nor the Council was represented. The Appellant explained that his central points related to the public interest in the Council disclosing the information in situations where there was at least a reasonable suspicion that the Council was acting unlawfully. He argued that it was unlikely that anyone would want to pursue the matter through the magistrates’ court where only a £40 was in issue, and that litigation, for example judicial review, would be a costly option for the Council if it had been acting

unlawfully. The ombudsman would not investigate potential maladministration if there were other legal remedies available to a complainant.

DISCUSSION

30. The first thing the Tribunal notes is that the Council appears to have provided the information sought by the Appellant when it replied to his request on 18 February 2020 and 17 March 2020. The request for the legal advice referred to by the Council in its response appears to us to have been a further request for information, and that in fact the Council has supplied the information sought already. Nevertheless it is clear that the Commissioner has gone on to specifically consider the subsequent request for the legal advice and it seems to us right that we should consider the appeal on the basis of the conclusions reached by the Commissioner and the arguments raised by the Appellant in relation to s42(1) FOIA.
31. It seems to us important to clarify how the public interest balance should be assessed in cases where the exemption in s42(1) FOIA is involved. Although the Appellant has relied heavily on the *Mersey Tunnel* case, that is a first-tier tribunal case and, as we have said, is not binding on us. We think it is important to concentrate on the approach set out in the *DBERR* case which is a High Court case which is binding upon us and post-dates the *Mersey Tunnel* case by two years (2009).
32. Thus, when considering the in-built significant weight to be afforded to legal professional privilege is something to be considered ‘in any event’ and ‘it is not necessary to demonstrate any specific prejudice or harm from the specific disclosure of the documents in question’ (see paragraph 51). That means, it seems to us, that neither the Council nor the Commissioner need to establish either that Council officials would be inhibited from seeking advice if disclosure were made in this case, or that advisers would be less likely to provide frank advice. The Tribunal needs to give significant weight to the public interest in maintaining LPP ‘in any event’.
33. That does not mean that the exemption in s42(1) FOIA is an absolute exemption for public authorities and all will depend on the public interest factors weighed in the balance in favour of disclosure. Indeed, cases like the *Mersey Tunnel* case show that disclosure under FOIA is always a possibility

which depends on public interest factors which are not in the control of public officials or those who advise them.

34. The Appellant in this case is convinced that most probably the Council is mistaken as to its parking policy and has got the law wrong, and has not considered his legal argument that relevant legal provisions which allowed the Council to issue criminal parking tickets have effectively been repealed. His approach seems to be that, when added to general public interest factors such as transparency and accountability, then that should be enough to entitle him to disclosure of the information.
35. However, in many cases it cannot be right that simply because a public authority is presented with a legal argument that it may be acting unlawfully (with which it disagrees) then the balance of the public interest is will outweigh the significant weight to be given to legal professional privilege. A public authority will most often be entitled to obtain legal advice on an issue and to rely on LPP to withhold it even when a request is made under FOIA, because of the in-built public interest established by the courts in maintaining LPP.
36. In this case there is clearly a public interest in disclosure as it relates to accountability and transparency in decision making, especially where the advice in question has been obtained with public funds and concerns a Council policy which allows criminal penalty notices to be issued. But the Council has explained the legal basis for its position when the request for information was made, and that it considered that it was acting lawfully.
37. The Appellant argues that the Tribunal 'is entitled to find that my suspicion of wrongdoing is plausible and reasonable' and take that into account when deciding on the balance of the public interest. But, as he acknowledged, it is not the role of the Tribunal to decide on the substantive legal issue he has raised. We would go further, in this particular, case and say that where the 'suspicion of wrongdoing' is based on complex legal arguments in a specialised area of law, we are not the forum to consider whether the Appellant's suspicions are reasonable or plausible or not.

38. In this case we are doubtful as to the public interest in disclosure, over and above general issues of accountability and transparency referred to above. It is clear that the Appellant himself is interested in the legal issue and has been for some time. But we have no evidence before us of other specific public interest factors in favour of disclosure beyond the Appellant's engagement with the issue.

39. As in other case where it is believed that a public authority is acting unlawfully, but the public authority disagrees that that is so, it seems to us relevant that the Appellant and others have other routes that can be taken if he wants to challenge the Council's legal position. There are other legal routes such as judicial review or an application for case stated, which could determine whether the Council is correct in its assertion as to the law. The Appellant (or anybody else) does not need to have access to the Council's legal advice covered by LPP to challenge the Council and of course if access is given that would not actually resolve any dispute.

40. In general, then, our conclusion in this case is that the public interest factors in favour of disclosure in this particular case do not outweigh the in-built significant weight the case-law says we have to give to non-disclosure of LPP material

CONCLUSION

41. For all these reasons the appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 2 August 2021

Promulgation Date: 4 August 2021