



NCN: [2023] UKFTT 666 (GRC)

Case Reference: EA/2022/0273

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

On the Papers

Heard on: 2 August 2023.

Decision given on: 7 August 2023.

Before:

**Tribunal Judge: Brian Kennedy KC
Tribunal Member: Paul Taylor and
Tribunal Member: Dave Sivers**

Between:

STEVEN DOWNES

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Steven Downes a journalist and Editor of “Inside Croydon” acting as a Litigant in Person.

For the Respondent: Helen Wrighton, Solicitor within the Information Commissioners’ Office in writing in the Response dated 16 November 2022.

Decision: The appeal is dismissed.

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) as, against the Commissioner’s decision notice 23 August 2022 with reference number IC-130630-R7Y9 (the “DN”), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the DN. The Appellant has requested correspondence between the London Borough of Croydon (“LB Croydon”) and a firm of solicitors. LB Croydon sought to rely on section 42 as its basis for not disclosing information it held within the scope of the request that was not otherwise the Appellant’s personal data. In the DN the Commissioner finds that LB Croydon is entitled to rely on section 42 as its basis for withholding information it holds within the scope of the request that was not otherwise the complainant’s personal data. On 3 October 2022, the Appellant filed a Notice of Appeal.
- [3] The Commissioner maintains the position set out in the DN opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology:

- [4] On 25 February 2020, the complainant requested information of the following description: *“Please provide me with copies of all correspondence, by whatever medium, between Jo Negrini, the council chief executive, Tony Newman, the council leader, the council's chief legal officer or other executives and the firm of solicitors, Harbottle and Lewis, dated between October 1, 2019, and today's date.”*

- [5] On the 16 April 2020, LB Croydon responded. There were aspects of its response which were unclear although it cited the exemptions at section 42 (legal professional privilege) and section 40 (personal data) as its basis for refusing to comply with the request, it was far from clear from LB Croydon's response whether it was refusing to confirm or deny that it holds the requested information or whether it was confirming it holds such information but was refusing to provide it because it believes an exemption applies.
- [6] The Appellant requested an internal review on 16 April 2022. LB Croydon sent him the outcome of its internal review on 16 June 2020. The internal review letter was similarly unclear. Following a further review of its position once it had been advised that the Commissioner had received a complaint about this matter, LB Croydon sent a further letter to the Appellant on 17 August 2021. Unfortunately, it neglected to send a copy to the Commissioner. In this letter, it confirmed that it was refusing to provide the information citing section 42(1). The letter of 17 August 2021 also addressed data protection concerns that the complainant had raised.
- [7] In essence the Appellant contacted the Commissioner on 29 August 2021 to complain about the way the request for information had been handled. The Commissioner commenced an investigation.

Legal Framework:

- [8] Section 42(1) states that: *"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."*
- [9] The withheld information comprises communications between a professional legal adviser and their client regarding published articles. LB Croydon argues that such communications are subject to legal professional privilege ("LPP").
- [10] LPP protects an individual's ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered. For these reasons LPP evolved

to make sure communications between a lawyer and their client remained confidential.

- [11] Section 42 is a class-based exemption. The requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information. However, this exemption is subject to the public interest test.

Commissioner's Decision Notice:

- [12] The Commissioner was provided with the withheld information which comprises communications between a professional legal adviser and their client regarding published articles. LB Croydon argues that such communications are subject to legal professional privilege ("LPP"). The Commissioner cites the authority in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* EA/2005/0023, where the FTT described LPP at Paragraph [9] as: - "*a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.*". The Commissioner correctly observed that LPP protects an individual's ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered and for these reasons LPP evolved to make sure communications between a lawyer and their client remained confidential.
- [13] 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, 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.

- [14] The Commissioner was satisfied that at the time the withheld information was created, LB Croydon considered that there was a reasonable prospect of litigation and that the dominant purpose for creating that information was the seeking or giving legal advice. He is also satisfied that privilege has not been waived – although he notes the complainant’s comments set out below that LB Croydon was not entitled to obtain legal advice using the public purse in this case.
- [15] However, the Commissioner points out that section 42 is a qualified exemption and therefore the public interest test must be considered and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Balance of Public interest:

- [16] The Commissioner acknowledged that the Appellant submitted very compelling arguments in favour of disclosure. Specifically, the Appellant argued that LB Croydon used public funds to obtain legal advice for what could reasonably be considered a private matter. The Appellant explained that the connection to the matter in question was a proposed libel action. The Appellant argued that LB Croydon using public funds to obtain legal advice on this was acting in an illegal way under local authority law (*The Local Authorities (Indemnities for Members and Officers) Order 2004 (legislation.gov.uk)*). The Appellant drew attention to article 6(3) therein, which states: “No indemnity may be provided under this Order in relation to the making by the member or officer indemnified of any claim in relation to an alleged defamation of that member or officer but may be provided in relation to the defence by that member or officer of any allegation of defamation made against him”.
- [17] Referring to comments of the First-tier Tribunal (Information Rights) in: *Crawford v Information Commissioner & Lincolnshire County Council (EA/2011/0145)*³, LB Croydon noted that the Tribunal in that case sought clear, compelling and specific justification for overturning reliance on the section 42 exemption. LLB Croydon argued that this was not applicable here. LB Croydon said when considering the

balance of public interest, it had not placed the public interest over the interests of LB Croydon but concluded that the balance of public interest favoured maintaining the exemption.

[18] The Commissioner recognised that the public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

[19] In his guidance on section 42, the Commissioner acknowledges that there is a general public interest in openness and transparency and the following factors in this case may add weight to arguments in favour of disclosure:

- *large amount of money involved;*
- *large number of people affected;*
- *lack of transparency in the public authority's actions;*
- *misrepresentation of advice that was given;*
- *selective disclosure of only part of advice that was given*

[20] Further case Law considered by the Commissioner included; *Bellamy v Information Commissioner & Secretary of State for Trade and Industry (EA/2005/0023)*, which was endorsed by Wyn Williams J in *DBERR v O'Brien v IC [2009] EWHC 164 (QB)* where “ - *the general importance of LPP communications was acknowledged [41 and 53]: - 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... [it] is acknowledged to command significant weight*”.

[21] However it was established in: *Boyce v IC and PHSO EA/2019/0032* that the public interest in disclosure does not need to be exceptional at [89]: “*In our view every case must be considered on its own merits, and it would be an error to seek to limit the application of the public interest test in relation to LPP material so as to give rise to a presumption that only in very exceptional cases would the public interest be in favour of disclosure.*”

- [22]** The Commissioner recognised that there is a strong public interest in protecting LB Croydon's ability to access full and frank legal advice. The Commissioner also recognised that there is a public interest in knowing more about what advice LB Croydon received, particularly given the legal framework referred to by the Appellant which appears to indicate a ban on councils taking action on behalf of individual council officers or members who believe they have been libelled.
- [23]** Taking the five bullet points set out at Paragraph [19] above in turn, the Commissioner considered the following matters; that £25,000+ of public money is a large figure. and as for the number of people affected, only those who may have been subject to libel action against them would have been directly affected. Obviously, council taxpayers in the area (a much larger number) would be indirectly affected. LB Croydon published the amount of money it spent on this legal advice which goes some way to serve the public interest in transparency about what it has done with public money. It enables the local community to discuss further whether it believes taxpayers' money was well-spent. The Commissioner is not certain that LB Croydon has misrepresented how it used its money although disclosure would serve the public interest in clarifying that point. There has been no selective disclosure of the actual advice obtained and therefore further disclosure would not be needed to give a fuller picture beyond selective disclosure.
- [24]** The Commissioner recognised the Appellant's argument that public money may have been spent on something which it should not have been. As such, the public interest in protecting LPP in this specific case appears to be weakened. However, the Commissioner recognises that there remains a very strong public interest in protecting LB Croydon's ability to obtain free and frank legal advice.
- [25]** By a narrow margin, the Commissioner has concluded that more weight should be given to the public interest in protecting LB Croydon's ability to access full and frank legal advice. The Commissioner found on balance, the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Grounds of Appeal:

[26] The Appellant argues the following in his grounds of appeal:

“My appeal is based on two important factors arising from The ICO’s report and decision.

First, the Commissioner has been deliberately misled by Croydon Council.

In para 25 of the ICO ruling, they quote Croydon Council as stating: “It explained that a third party (the publication connected to the complainant [namely InsideCroydon.com]) ‘had published articles containing factual inaccuracies which it had been asked to correct’.”

In the period in question, neither I, personally, nor in my capacity as Editor of Inside Croydon, have received any request to correct our coverage of Croydon Council from Croydon Council at any point before we received the letters from the external solicitors, Harbottle and Lewis, whose advice, the Commissioner’s report agrees, was paid for unlawfully using council resource.

I am a journalist of 40 years’ experience who in that time has worked at various times for Reuters, The Times and The Observer, among others. In the 12 years of operating our local news website, I have always maintained a strict editorial policy of providing a right of reply and to correct any errors of fact in our reporting where they can be demonstrated to be the case. I can also assure you that we also apply the highest levels of journalistic rigour to our reporting. This can be seen to be demonstrated by the lack of any legal action against myself and Inside Croydon following our (robust) responses to Harbottle and Lewis following their initial letters on behalf of Jo Negrini and then Tony Newman.

To re-state, I received no correspondence from Croydon Council before or

after the Harbottle and Lewis letters on behalf of Negrini and Newman regarding any aspect of our reporting. I would suggest that you request that Croydon Council provides evidence to support its claim that it asked for corrections. I would submit that this deliberate attempt to mislead the ICO provides further strong reason for the requested disclosure, since the public pronouncements of the council cannot always be trusted.

This brings me to the second reason for wishing to appeal the ICO's decision. The two council officials most closely involved in providing the legal advice to the chief executive and council leader, encouraging the unlawful use of public resources to pursue its threats were Jacqueline Harris-Baker, at one point the Borough Solicitor, and Shaun Murphy, her deputy. Both are, or were, registered as qualified lawyers.

Both provided legal advice to Negrini and Newman which led to the costly and unlawful use of council resource to pursue what should only have been private cases. When I submitted my FoI requests for disclosure of correspondence related to this case, it was Shaun Murphy who dealt with my request and sought to block it. The ICO's ruling in the case risks only serving to continue to cover-up the unlawful actions of very senior council officials, which is utterly against the public interest."

The Commissioner's Response:

- [27] The Commissioner resists the appeal. The Commissioner relies upon his DN and findings therein. In his Response to the Grounds of Appeal the Commissioner responded to each submission made by the Appellant as follows;
- [28] First, the scope of the material information request is set out in the request of 25 February 2020, i.e., the date range covered by the request runs from 1 October 2019 to 25 February 2020. Accordingly, the information provided by the Council as

part of the Commissioner's investigation which post-dates 25 February 2020 does not fall within scope.

[29] Second, the Appellant appears to be of the view that his 25 February 2020 request would include both internal communications between the individuals listed in his request as well as communications between those individuals and the external solicitors. However, the Commissioner views the scope of the 25 February 2020 request does not include internal communications, to the extent that any such emails were provided by the Council, the Commissioner considered these to fall outside of scope.

[30] Third, the Commissioner considers that any attachments to the communications within the scope would also fall outside the scope of the request and this coincides with the Council's view. Even though the content of the attachments is obvious in most cases, it does not appear that all attachments were provided. The Commissioner indicated the Tribunal should see them.

[31] On Ground One: The Appellant argues that the Commissioner was: "*- - - given demonstrably false information by Croydon Council. In para 25 of the ICO ruling, they quote Croydon Council as stating: "It explained that a third party (the publication connected to the complainant [namely inside Croydon.com] 'had published articles containing factual inaccuracies which it had been asked to correct'"*

In the period in question, neither I, personally, nor in my capacity as Editor of Inside Croydon, have received any request to correct our coverage of Croydon Council from Croydon Council at any point before we received the letters from the external solicitors, Harbottle and Lewis, - - - -

To re-state, I received no correspondence seeking any corrections from Croydon Council before or after the Harbottle and Lewis letters on behalf of Negrini and Newman regarding any aspect of our reporting.

I would suggest that you request that Croydon Council provides evidence to support its claim that it asked for corrections.

I would submit that this deliberate attempt to mislead the ICO provides further strong reason for the requested disclosure, since the public pronouncements of the council cannot always be trusted”

[32] First, the Council openly confirmed its position on this point to the Appellant in its correspondence of 17 August 2021 which was then reproduced in a letter from the Commissioner to the Appellant.

[33] This allowed the Appellant to make his own comments in rebuttal during the Commissioner’s investigation. The Commissioner alluded to the same in his decision notice as a fuller reproduction of paragraph 25 of the DN demonstrates.

“ - - LB Croydon . . . explained that a third party (the publication connected to the complainant) had published articles containing factual inaccuracies which it had been asked to correct”. (The Commissioner noted that the complainant characterised communications it received from LB Croydon on this matter in a different way.

[34] Further, the reference to this point at paragraph 25 DN was made to explain the context in which the request was made. It was not used as a factor to assist in determining where the balance of public interest lay.

[35] Accordingly, the Commissioner did not consider this ground disturbed his finding on the public interest test.

[36] On Ground Two, the Appellant argued: “ . . . *The two council officials most closely involved in providing the legal advice to the chief executive and council leader, . . . were Jacqueline Harris-Baker, at one point the Borough solicitor, and Shaun Murphy, her deputy. Both are or were registered as qualified lawyers.*

Both provided legal advice to Negrini and Newman which led to the costly and unlawful use of council resource to pursue what should only have been private cases.

When I submitted my FoI requests for disclosure of correspondence related to this case, it was Shaun Murphy who dealt with my request and sought to block it.

Having been deliberately misled, the ICO's ruling in the case risks only serving to continue to cover-up the unlawful actions of very senior council officials which is utterly against the public interest."

[37] Having acknowledged his decision on the public interest test was made on a very narrow margin, the Commissioner asserted that the public interest test favoured maintaining the exemption.

[38] The Commissioner invited the Tribunal to dismiss the appeal and the parties agreed to a hearing on the papers.

The Hearing on 2 August 2023:

[39] The Tribunal met on 2 August 2023 and having read all the papers, deliberated thereon, including the withheld information. We too acknowledge the validity of some of the concerns raised by the Appellant and the importance of transparency and accountability on the Council as a public authority responsible for expenditure of public funds. That said, we can find no error in the Commissioners' reasoning within the DN and his Response to the grounds of appeal as set out above, nor any flaws in the exercise of his discretion on the balance of the public interest test. We accept and adopt same herein. We are particularly supportive of the stance adopted on the importance of LLP in this context. However, we have gone further and made our own assessment afresh. On careful examination we are convinced that the outcome of the DN should stand for the reasons already established in the DN and further e.g. as exemplified by a letter at page C74 of the Open Bundle before us. In this letter the Council clearly identify the precise focus of the request as copies of all correspondence between 1 October 2019 and 25 February 2020 (the date of the request). At page C76 of the Bundle, in this letter the Council also clearly explain: ". . . 'the information within the ambit of your request was all created for the main purpose of giving or obtaining legal advice regarding litigation', which was the case at the time. Although a claim was subsequently not issued, the Council has confirmed the litigation was reasonably anticipated when the emails were created. Harbottle and Lewis acted in their professional capacity, providing advice and support and the correspondence generated relates to the proposed litigation."

[40] It is unambiguous from this that the timing of the request (25 February 2020) was during the period that the anticipated legal action was being considered. Consequently, the matter at hand was clearly live at the time of the request. In our view this adds significant weight to the public interest in maintaining the exemption on the facts pertaining in this case.

Conclusions:

[41] The Tribunal recognises that each case must be determined on its merits. Having considered all the evidence before us, including the withheld information, the Tribunal is persuaded that in all the circumstances of this case the Public Interest in disclosure of the withheld information is outweighed by the significance and importance of maintaining the protection afforded by LLP.

[42] Accordingly, we must dismiss this appeal.

Brian Kennedy KC.

4 August 2023.

Promulgated

7 August 2023.