



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50820189**

Appeal Reference: EA/2019/0381V

Heard by video on 17 December 2020

Before

JUDGE CHRIS HUGHES

Between

PETER KITCHIN

Appellant

and

INFORMATION COMMISSIONER

First Respondent

BERRYNARBOR PARISH COUNCIL

Second Respondent

Appearances: -

Appellant: In person

First Respondent: no appearance

Second Respondent: Mr Simon Fuller (solicitor, North Devon District Council)

Case:-

DBERR v O'brien and IC [2009] EWHC 164

DECISION

1. A dispute arose between Mr Kitchin and the Berrynarbor Parish Council after it installed three items of play equipment on the village recreation field close to

the boundary of his property in 2015. Mr Kitchin and his wife commenced proceedings in the County Court alleging negligence, nuisance and misfeasance in public office. The claims in negligence and misfeasance were dismissed and directions with respect to the claim for nuisance were given in December 2016. Offers of settlement were discussed in January 2017 but did not resolve the issue. On 3 October 2017 Mr Kitchin sought information: -

"The decision which you took to refuse the offer must have been minuted within the PC – although understandably it was not in the published meetings. We now require you under the Freedom of Information Act 2000, to furnish us with the minutes / records of all meetings and conversations that refer to the decision that refused our offer and the reasons for that decision."

2. The Parish Council replied promptly that it did not hold any information and further explained its position that there was no other suitable location for the equipment and so there was no change in its position after the offer. Mr Kitchin sought a review and lobbied the Council which maintained its position. He delayed too long in pursuing the matter with the Information Commissioner who therefore declined to investigate. Mr Kitchin made a further request on 17 January 2019: -

"12 months have passed since the letter and we ask that you confirm that the Council has not, in the meantime discovered any such minutes and / or records of all meetings and conversations held on this matter and confirm that, as far as the Council is concerned, the matter is closed."

3. The Council maintained its position *"There is no further information to add in relation to your FOI request and the review which the Chairman undertook in January 2018."*
4. Mr Kitchin complained to the Information Commissioner that there was information in the Parish Council's records and since the offer had been made through the parties' solicitors there should be correspondence relating to it from the lawyers. The Council confirmed that it had searched *"This search included minutes and emails along with correspondence between the Council, Council's solicitor and the insurance company."* In response to a direct question from the Information Commissioner the Council confirmed that it did not hold any recorded information. The Council stated that it did not hold any such information. It also told her that the matter was dealt with by the Council's insurance company and the Council solicitor. It included in its responses an e-mail from their solicitor of 6 April 2018 which had confirmed to Mr Kitchin that: -

"all discussions and correspondence between ourselves and Berryarbor Parish Council are legally privileged and therefore not disclosable. Likewise, any discussions between Berryarbor Parish Council members about offers of settlement are also privileged, and therefore not disclosable"

5. The Information Commissioner concluded on the balance of probabilities that no information matching the description was held.
6. Mr Kitchin appealed against this finding and the Information Commissioner maintained the position she had adopted in her decision notice. The Parish Council response did not meet the procedural requirements of the tribunal and The council was directed to provide further submissions addressing the issue of whether it holds any information in whatever form including information it may considered to be legally privileged relating to the subject matter of Mr Kitchin's request. The Council then instructed the legal department of their District Council. On 20 July Mr Fuller confirmed that the Parish Council had been in error because there was correspondence with the firm of solicitors who had been acting for the Parish Council in the litigation. The Parish Council had not considered this correspondence fell within the meaning of minutes/records of a meeting or a conversation. It claimed exemption for the material under s42 FOIA.
7. In the hearing Mr Kitchin emphasised that the issue was the transparency of the parish council's decision-making. He had offered to fund the movement of the play equipment and make a donation to the parish council. The offer had been rejected. As a result of the litigation a basket-swing had been taken down and was now in storage. He stated that the published minutes of each meeting of the Council showed the part of the record which dealt with the dispute blanked out.
8. At the hearing I made a direction for a search to be conducted of the minutes of the Council to determine whether any discussion had taken place in private. In a written statement dated 4 January 2021 the current Parish Clerk, Ms Petters, has confirmed that no parish council discussion of Mr Kitchin's offer was held during the confidential part of any meeting in 2017.
9. From the information before me I am satisfied that the issues before the tribunal have moved beyond the findings of the Information Commissioner's decision notice which was based on an error of fact. The issue with which I have to deal is whether the information which has now been identified should be disclosed or may be withheld under s42 FOIA.
10. Mr Fuller by an e-mail of 20 July 2020 apologised for the error of the Parish council and set out its position with respect to the balance of public interest with respect to the disclosure of the legal correspondence. While the litigation was no longer active it remained possible that there could be further claims by Mr Kitchin against the Parish Council. He further argued that the matter was a personal issue relating to Mr Kitchin's claim of nuisance with respect to the location of play equipment close to his property which did not affect the wider community, furthermore since the Council was insured the financial

implications for there were not large issues of public finance. In the hearing he maintained that position.

Consideration

11. S42 of FOIA provides

42 Legal professional privilege.

(1) 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.

12. S2 requires the tribunal to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In *DBERR* the High Court that the tribunal has a duty to give significant weight to the interest in maintaining legal professional privilege as it was in the public interest for public bodies to receive disinterested and frank professional advice in making decisions and there was less likelihood that they would receive such advice if they knew that it was to be made public.

13. On the other side of the balance is something which objectively is a Mr Kitchin's interest in his personal litigation which does not have wide implications. The request was made very soon after the hearing in of a claim of nuisance between two land owners one of which is a Parish Council.

14. To order the disclose of the information would in these circumstances not be in the public interest but would rather erode legal professional privilege both for public authorities but more generally cutting away at a significant aspect of the rule of law and the rights of all recipients of legal advice to no public benefit.

15. The appeal is dismissed on grounds other than contained in the Decision Notice.

Signed Hughes

Judge of the First-tier Tribunal

Date:11 February 2021