



Neutral citation number: [2025] UKFTT 00085 (GRC)

Case Reference: EA/2024/0257

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

**Heard by Cloud Video Platform
Heard on: 12 November 2024
Decision given on: 4 January 2025**

Before

**JUDGE HEALD
JUDGE KIAI
MEMBER GASSTON**

Between

**THE ROYAL BOROUGH OF GREENWICH
'RBG'**

Appellant

and

**THE INFORMATION COMMISSIONER
'ICO'**

Respondent

Representation:

For the Appellant: Cecilia Ivimy

For the Respondent: Unrepresented

Decision: The appeal is allowed. The Information Commissioner's Decision Notice, referenced as IC-267171-T6L1, is not in accordance with the law.

Substituted Decision Notice:

For the reasons set out below the Tribunal has concluded that the requested information (the Draft Addendum Report) is exempt from disclosure under regulation 12(5)(b), alternatively regulation 12(4)(d) and the public interest favours maintaining those exemptions. The Commissioner erred in concluding otherwise and the appeal is therefore allowed. The decision is set aside.

REASONS

Introduction

1. This appeal is brought by the Royal Borough of Greenwich ('RBG'). It concerns an attachment to an email dated 21 February 2022, requesting legal advice from RBG's external lawyers, Freeths LLP. The attachment is a draft report (relating to an experimental traffic scheme: the West Greenwich Low Traffic Neighbourhood (the 'LTN Scheme'). The email sought legal advice on the draft report from RBG's external lawyers, Freeths LLP.
2. The Appellant (RBG), appeals against the Commissioner's decision notice (the 'DN') IC-267171-T6L1 of 6 June 2024 which held that:

'1. The complainant has requested a draft report and correspondence from Royal Borough of Greenwich ("the public authority"). The public authority refused to provide the requested information, citing regulation 12(5)(b) (the course of justice and inquiries exception).

2. The Commissioner's decision is that the regulation 12(5)(b) exception, as regards the "correspondence" is engaged and that the public interest was in maintaining the exception.

3. The Commissioner further decided that the regulation 12(5)(b) exception, as regards the draft report, is not engaged.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation...'

2. The Appellant, RBG, appeals under s.57 of Freedom of Information Act 2000 ("**FOIA**"), read with reg. 18 of the Environmental Information Regulations 2004 ("**EIR**"), against that decision notice. It is not in dispute that these apply.

Factual background to the appeal

3. The accepted "list of agreed facts" set out at paras 6 to 14 of the Respondent's Response is set out below:

6. The requestor (Joseph Thomas), not joined, had previously requested information from RBG on the topic of the West Greenwich Low Traffic Neighbourhood ("the LTN Scheme"). As set out in paragraphs 6 and 7 of the Appellant's Grounds, two reports were produced for the RBG's Cabinet Member for Environment, Sustainability and Transport to decide the future of the LTN Scheme. These Reports were named Addendum and Main report respectively, and the final versions were dated 23 February 2022.

7. On 29 May 2023...the requestor emailed RBG with the following request for information:

8. "With regards to the draft skeleton of the addendum report, I am hoping to see the draft report as attached to the email timed 21 February 2022 12:21 and not the final report. Please may that draft report be shared.

9. Please may all correspondence sent to and received by Robert Bruce, Partner, Freeths LLP regarding the West Greenwich Lower Traffic Neighbourhood be disclosed."

10. On [2]6 September 2023 RBG responded, confirming it held the draft Addendum Report and correspondence, but refusing the request relying on Regulation 12(4)(d) EIR (material in the course of completion). It upheld reliance in its internal review of 24 October 2023.

11. The requestor contacted the Commissioner on 29 October 2023 to complain about the way his request for information had been handled.

12. On 1 March 2024 RBG sent a revised response to the requestor; stating the information in both parts of the request attracted legal advice privilege and so Regulation 12(5)(b) EIR (the course of justice and inquiries exception) applied, and the public interest favoured maintaining the exemption.

13. RBG reiterated this to the Commissioner on 22 March 2024, stating "the Council now relies on regulation 12(5)(b)...our full and final submissions on why the exception - Regulation 12(5)(b) applies are..."

14. On 6 June 2024 the Commissioner issued the DN, upholding RBG's reliance on 12(5)(b) EIR to withhold the correspondence (DN §2, 22-23, 27-29) but ordering it (DN §4) to disclose the draft Addendum Report on the basis it did not engage 12(5)(b) EIR exception'.

The ICO's Decision Notice

4. The ICO determined in a decision notice dated 6 June 2024 that:
 - a. Regulation 12(5)(b) *as regards the 'correspondence'* is engaged and the public interest was in maintain the exception – this is not an issue in this appeal.
 - b. Regulation 12(5)(b) *in relation to the draft report* is not engaged. The RBG was directed to provide the complainant with a copy of the draft report as attached to the email timed 21 February 2022 12:24 as requested.
5. The ICO concluded that there was nothing in the report to suggest the involvement of a lawyer from Freeths solicitors in the matter. The draft report was authored by an employee of the public authority who was not a lawyer. There was no accompanying evidence to indicate the involvement of the lawyer from Freeths or any other lawyer. The ICO, given the lack of evidence, concluded that there was nothing to substantiate the claim that the draft report is a legally privileged communication between the public authority and a lawyer, it did not therefore attract legal advice privilege ('LAP'). Therefore it concluded that regulation 12(5)(b) was not engaged.

The Grounds of Appeal

6. Before the Tribunal, RBG appealed the decision on the following grounds:

Ground 1: the Commissioner erred in deciding that reg. 12(5)(b) was not engaged; he should have found that the disclosure of the Draft Addendum Report (i) would adversely affect the course of justice within the meaning of reg. 12(5)(b) because it was subject to legal advice privilege and/or formed part of confidential communications between RBG and its lawyer and (ii) that the public interest weighed in favour of maintaining that exception; further or alternatively

Ground 2: the Draft Addendum Report was exempt from disclosure under reg. 12(4)(d) (unfinished documents) and the public interest weighed in favour of maintaining that exception.

The Commissioner's response

7. The ICO resisted the appeal, relying on his Response dated 2 August 2024 (amongst various other documents). In that document he maintains:

Ground 1 (Unfinished Document):

8. RBG may place late reliance on exceptions (*Birkett*). As the draft Addendum Report is an unfinished document, it falls within the definition in reg. 12(4)(d) EIR and the exception is engaged.
9. However the ICO concludes that the public interest does not weigh in favour of the exception because:
 - a. The relevant time for determining the balance of public interest is the date RBG should have responded to the request (*Montague v the IC (2019)*). This is 23 June 2023, 18 months after the publication of the report and the decision to remove the LTN scheme was announced. The ICO disputes the assertion that disclosure would have intruded into the safe space reasonably needed by RBG to consider and discuss the LTN scheme and was liable to have a chilling effect on future discussions in relation to the scheme;
 - b. Unlike FOIA, EIR has a presumption in favour of disclosure (12(2)). The public interest reasons in favour of disclosure as set out by the Appellant in their refusal notice are '*openness, transparency and accountability and for members of the public having access to information which enables them to understand more clearly why certain decisions have been made and the Council's rationale and reasoning. The Council acknowledges there is a strong public interest in disclosure of information which would demonstrate that the relevant issues have been properly discussed and deliberated*'. The ICO states that it agrees with these reasons and asserts that that the decision to introduce the LTN was controversial amongst Greenwich residents and there is a lot interest in how RBG came to scrap the scheme. Disclosure would meet the interest.

Ground 2 (Legal Privilege):

10. The ICO asserts that there are 2 reasons why 12(5)(b) EIR does not apply:
 - a. LAP does not apply to communications ***before*** legal advice is sought;
 - b. The ICO denies that the draft Addendum report was sent in a "relevant legal context" and it does not therefore attract the exception.

11. The ICO does not address the issue of Public Interest as he maintains that the exception is not engaged.

RBG's reply

12. RBG's reply, dated 5 September 2024 responds to the points set out in the ICO's Response as follows:

Ground 1 (Unfinished Document)

13. Although the request was made 15 months after the draft report was shared by the Appellant with its lawyers, this does not negate the 'safe space' arguments. The issue of the continuation of a Low Traffic Neighbourhood in Greenwich remained live at the date of the Request.

14. Further, disclosure would likely have a 'serious inhibiting effect' on the sharing of draft reports in similar circumstances in the future – to the detriment of proper and legally robust decision-making by the Appellant, which is contrary to the public interest.

15. The Appellant maintains that the ICO has not identified why or in what respect, disclosure of the draft report would significantly further transparency or understanding of the Appellant's decision-making process with respect to the LTN. She maintains that it would not, asserting that disclosure would undermine the important public interest principle that persons - including public authorities - must be able to consult their lawyers in confidence. That principle should not be undermined, absent some compelling public interest to the contrary.

Ground 2 (Legal Privilege):

16. The ICO's summary of the law is overbroad. A client should be able to obtain legal advice in confidence. Privilege therefore attaches to documents which are prepared and shared as part of a continuum of legal advice on a transaction/contentious matter. In the present case the draft addendum report formed part of the materials prepared by the Appellant (as client) and was shared with its external lawyer for the purpose of seeking legal advice, it was therefore privileged.

17. Further, the request sought a copy of the draft addendum report, in circumstances where the final version of the report was published 3 days later. Disclosure of the draft report would therefore reveal – through comparison of

the 2 versions of the report – the content of the legal advice given on the draft report. It is therefore privileged for that reason also.

18. The email sent at 12.24 was addressed to the Appellant's external lawyer for the purposes of seeking his advice. It was intended to be sent to him however through a clerical error it was not, instead it was sent to the in-house lawyer and others. This error did not deprive the message of its confidential nature nor did it negate its obvious and dominant purpose: to obtain legal advice from the external lawyer.
19. Even if the draft report would not attract LAP – the issue to determine is not the technical application of the law on advice privilege but whether it 'would adversely affect the course of justice'. It would do so because it would inhibit the Appellant from seeking legal advice in respect of contentious decision relating to the LTN.

Legal Framework

20. 'Environmental information' is defined in regulation 2(1) EIR. This provides, in so far as relevant:

'(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the

exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.[...]

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that - [...]

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data [...]

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect — [...]

(b) 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'.

21. The relevant part of reg. 5 EIR says as follows:-

'5.—(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.'

22. The EIR treats information about emissions as a special category of information. Additionally reg. 12(2) EIR provides that a public authority is to apply a presumption in favour of disclosure.

Withholding Information under the EIR

23. Regulation 12(5)(b) EIR states:

'For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect

(b) 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'

17. Where information is subject to legal professional privilege (LPP), the exception in regulation 12(5)(b) EIR is likely to be engaged: *DCLG v IC* [2012] UKUT 103 (AAC). The Upper Tribunal (UT) agreed with arguments that *'...it would be possible to conclude that the course of justice would not be adversely affected if disclosure were to be directed only by reason of particular circumstances, (eg that the legal advice is very stale), such that there would be no undermining of public confidence in the efficacy of LPP generally'* and *'whether [regulation]12(5)(b) is engaged, in the case of information protected by LPP, must be decided on a case by case basis'*.

18. At paragraph 50 of the decision, the UT also said that:-

'... in determining whether disclosure "would adversely affect the course of justice", the IC or tribunal is not limited to considering the effect (if any) on the course of justice in the particular case in which disclosure is sought. The IC can and must take into account the general effect which a direction to disclose in

the particular case would be likely to have in weakening the confidence of public authorities generally that communications with their legal advisors will not be subject to disclosure. In our judgement that submission is correct'.

19. The Commissioner's guidance explains⁽¹⁾ that *'in an FOI context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered confidential'.*

20. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the Information Tribunal described LPP 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'.

21. LPP includes LAP.

22. Regulation 12(4)(d) states:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data"

The Tribunal's Role

23. The Appeal is by reg. 18 EIR (which provides that the appeals provisions under Part V of FOIA shall apply as modified for the purposes of the EIR) and section 57(1) FOIA which provides that:-

"Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice."

24. By section 58 FOIA the Tribunal's role is to consider whether the DN is in accordance with the law or where the ICO's decision involved exercising discretion, whether it should have exercised it differently. It is a full merits

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/>

jurisdiction. The tribunal may receive evidence that was not before the ICO and may make different findings of fact from the ICO. If the Tribunal determines the DN was not in accordance with the law or that a discretion should have been exercised differently it can allow the appeal and/or substitute a different Notice that could have been served by the ICO. Unless these apply the Tribunal shall dismiss the Appeal.

Discussion and Conclusions

25. For the purposes of determining this appeal, we have considered those documents contained within the open bundle consisting of 393 (electronic) pages, the closed bundle of 51 (electronic) pages, which contained the information requested the various written submissions and the oral submissions made by the Appellant's legal representatives during the course of the hearing on 12 November. We note that the ICO did not send a representative to the hearing, but instead relied on their written submissions. The requester was not joined to the appeal.

Issues

26. The Tribunal has to determine the following issues:

1. Is reg 12(5)(b) engaged? Would disclosure of the Draft Addendum Report (i) adversely affect the course of justice within because it was subject to legal advice privilege and/or formed part of confidential communications between RBG and its lawyer?
2. If so, does the public interest weigh in favour of maintaining that exception?
3. Is reg. 12(4)(d) engaged (as an unfinished document)?
4. If so, does the public interest weigh in favour of maintain the exception?

Is Regulation 12(5)(b) engaged (ie would disclosure adversely affect the course of justice to withhold it)?

27. The ICO maintains that this exception is not engaged and that legal advice privilege does not apply to communications **before** legal advice is sought. The primary submission relied upon is that the draft report was not authored by a

lawyer, it was drafted by an employee of the public authority. It was not therefore a legally privileged communication between a public authority and a lawyer and the exception did not apply.

28. Having considered all the evidence at some length, the Tribunal concluded that this submission was misconceived for the reasons set out below.
29. Firstly: the Tribunal concluded that the Draft Report *is* subject to LPP. LPP attaches to confidential communications passing between a client and lawyer for the purpose of enabling the client to take advice in a 'relevant legal context'. The purpose of LPP is to allow legal advice to be sought and given. We accept the submission that the email and draft report were confidential and their sole purposes was to enable RBG to take legal advice on its legal obligations. The draft report has not been disclosed and privilege has not been waived (unlike the email of 21 February 2021 at 12:21 which was voluntarily disclosed). As such LPP attached to it.
30. We have considered the ICO's submission that LPP does not attach to documents created before legal advice was sought, however we find that this is a misunderstanding of the law. LPP attaches to a document where the purpose is to seek legal advice. In this case, the draft report was prepared by officials in the context of an ongoing series of communications between RBG and its internal and external lawyers. The purpose of this was the seeking of legal advice. We do not agree that the draft report was a document which simply existed before legal advice was sought. We accept the submission that it was part of a continuum of correspondence and that as such, LPP attaches to it (noting the comments of the Court of Appeal held in *R(Jet2.com Ltd) v Civil Aviation Authority [2020] QB (CA)* at §69, 93-94).
31. Again we accept the submission that the draft report was communicated in a legal context for the reasons set out above. Although we note that the draft report was initially (in error) sent only to RBG's internal lawyer and team, we agree that this does not mean it was not a 'communication' seeking advice in a relevant legal context. In coming to this conclusion, we were taken to – and attached weight to – the ICO's own guidance when considering LPP in the context of section 42 FOIA which provides that '*Communications might include draft documents prepared with the intention of putting them before a legal adviser, even if they are never sent to the adviser*'.
32. Lastly, we also note the submission that a comparison of the final addendum report and the draft report, may reveal the contents of the legal advice. Again, we accept that this would attract LPP.

33. Even if we are wrong on this, regulation 12(5)(b) does not require a document to be legally privileged. The legal test is that disclosure would '*adversely affect... the course of justice*'. We concluded that disclosure would adversely affect the legal position of RBG and therefore would adversely impact the course of justice for the following reasons: the LTN scheme remained a live and contentious issue at the date of the request, because steps were being taken to introduce a new LTN scheme pursuant to a decision taken on 24 February 2024 (the request seeking a copy of the draft was dated 29 May 2022). As such, there was a real risk that decisions in relation to the LTN could be the subject of legal challenge. Disclosure would have undermined the confidentiality of RBG's communications with its lawyers on the LTN scheme, in circumstances where there was a real possibility of litigation.

The Public Interest Test

34. The ICO did not make submissions in relation to this, maintaining, simply, that it was not engaged.

35. It is well established that the principle of LPP carries inherent public interest weight *Callender Smith v IC & CPS* [2022] UKUT 60. For the reasons set out above we have concluded that there would be a risk of adversely affecting the course of justice. Taken together, we conclude that the public interest weighs in favour of maintaining the exception.

Is Regulation 12(4)(d) (unfinished documents disclosure) engaged?

36. The ICO accepts that this exception is engaged (indeed it is evident that the draft report is an unfinished document and the Tribunal agree that the exception is therefore engaged). This is not therefore an issue in dispute.

The Public Interest Test

37. RBG contend that the public interest in disclosure of the draft report is limited.

38. The Upper Tribunal held that the purpose of reg.12(4)(d) is '*allowing public authorities to think in private*' (*Highways England v Information Commissioner* [2018] UKUT (AAC)). RBG submit that this is particularly important for draft reports of the type in issue on appeal. The Appellant relied on the submission that disclosure of drafts of this kind intrude into the safe space required for

analysing evidence and developing options and recommendations, and disclosure is likely to lead to speculation and debate about why changes have occurred. This in turn is likely to inhibit the way in which officials draft and share reports. The Appellant submits that the chilling effect can be inferred from the fact of intrusion into a safe space *Department for Health and Social Care v IC* [2020] UKUT 299 (AAC) §28 – when considering the issue in the context of s35(1) FOIA.

39. The Appellant submits that the draft report was drafted in a legal context and as part of communications with RBG’s lawyers seeking legal advice. Disclosure in these circumstances would intrude into the confidential space needed for RBG to take legal advice on the LTN. There is a strong public interest in maintaining the confidentiality and of communications with lawyers especially where there was and remains a real possibility of legal challenges to RBG’s decision making regarding the LTN.
40. Again the submission was made that disclosure would likely lead to speculation about whether changes between the draft and final reports were made as a result of legal advice.
41. Disclosure would intrude into the safe space required to develop options and recommendations on the LTN and would likely lead to speculative debate about the reasons for such changes as at the date of the request, the issue was live – with RBG working to replace the LTN.
42. Disclosure would undermine officials’ confidence that there is a safe space where they can communicate confidentially without the fear of premature disclosure. We find that it could, as submitted, inhibit future communications on the topic in the circumstances. We accepted the submission that this would be contrary to the public interest
43. The ICO submitted that the lapse of time between the date of the request/response and the date of the report rendered the ‘safe space’ argument invalid. He maintains that it would have a ‘chilling effect’ on future discussions in relation to the scheme.
44. In response, the Appellant submitted that this submission *‘ignores the fact that: (a) the weight to be given to the need for a safe space does not end the moment a decision is taken; the extent to which it remains valid and the weight to be given to it will depend on the specific facts of each case; and (b) in fact, as already explained, the LTN issue remained live and contentious as at the date of the request and the response’*. Having already accepted that the issue remained live and contentious at the date of the request and response, we conclude that the ‘safe space’ argument is valid in the particular circumstances and that as a result,

which considered with the other submissions set out above, the public interest lies in favour of the exception.

Decision

45. For the reasons set out above we do consider that LBG was entitled to rely on regulation 12(5)(b) EIR and the public interest does not favour disclosure. We further consider that LBG was entitled to rely on regulation 12(4)(d) and again we conclude that the public interest does not favour disclosure. Accordingly we do not consider the DN to be in accordance with the law. The appeal is therefore allowed and the decision is set aside.

Signed

Judge Kiai

Date:

22nd January 2025