



Neutral citation number: [2024] UKFTT 00932 (GRC)

Case Reference: FT/EA/2024/0157V

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

**Decision given on: 28 October 2024**

**Before**

**JUDGE A. MARKS CBE  
MEMBER D. COOK  
MEMBER E. YATES**

**Between**

**ANTHONY CARROLL**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**

For the Appellant: the Appellant represented himself

For the Respondent: Helen Wrighton, Solicitor

**Decision:** The appeal is **dismissed**.

## REASONS

### Introduction

1. This appeal concerns a request to Rhondda Cynon Taf County Borough Council ('RCT') made by the appellant ('Mr Carroll') under the Freedom of Information Act 2000 ('FOIA') but which RCT treated as a request under the Environmental Information Regulations 2004 ('EIR').
2. This case arises from the collapse of a dormice bridge over the A473 near Pontypridd.
3. Mr Carroll does not dispute that the EIR (rather than FOIA) is the correct information rights regime.

### Issues for this Tribunal to decide

4. We consider that the issues which the Tribunal has to decide in this case are:

**Question 1:** Was the Commissioner wrong in law to determine that the information withheld by RCT falls within the exceptions to the duty to disclose under EIR, specifically Regulation 12(5)(b)?

**Question 2:** If not, should the Commissioner nevertheless have exercised his discretion differently and found the balance of the public interest favoured disclosure rather than maintaining the exception?

### Request for information, internal review and response

5. On 9 September 2023, Mr Carroll emailed RCT. For the purposes of this appeal, the relevant part of the email reads as follows:

*To clarify items regarding legal and solicitors advice, I request, under FOI if necessary, the actual advice received from your KC, which you say in your report states that there is a reasonable chance the that Council will win. I would like to see the full wording of this advice.*

*In addition,...I fail to understand why your solicitors advise that only action against Costain is relevant when in fact Redstart had a very major role. I therefore request the actual advice received from your solicitors, again using FOI if necessary.*

6. On 9 October 2023, RCT responded, stating that the information requested was exempt under EIR 12(5)(b) as it was subject to legal professional privilege ('LPP').
7. On 10 October 2023, Mr Carroll requested an internal review of RCT's handling of the request stating that RCT's decision not to pursue litigation 'would appear illogical when considering the evidence'.

8. On 8 November 2023, RCT informed Mr Carroll that its internal review upheld its original reliance on EIR 12(5)(b) to withhold the information.
9. On 11 November 2023, Mr Carroll contacted the Commissioner to express dissatisfaction with RCT's handling of his request.

### *The Decision Notice*

10. On 9 April 2024, the Commissioner issued his Decision Notice which in summary concluded that:
  - a. the exception in EIR 12(5)(b) applies; and
  - b. the inherent public interest in protecting the established convention of LPP is not countered by the arguments in favour of disclosure.
11. Consequently, in the Commissioner's judgment, the balance of the public interest favours the exception being maintained and therefore RCT was not obliged to disclose the requested information.

### *Appeal to the Tribunal*

12. On 23 April 2024, Mr Carroll sent a Notice of Appeal to the Tribunal challenging the Commissioner's decision notice.
13. The basis of the appeal is that:
  - (a) the legal advice requested is already in the public domain because a summary of it (to the effect that RCT has a reasonable case against the contractor) is referred to in a Report by RCT's Service Director Highways and Engineering in June 2023 ('the Report'); and
  - (b) the Commissioner wrongly assessed the balance of the public interest because a large amount of public money was paid for the faulty design and construction of the bridges which the Council should claim back. It is in the public interest to know the exact legal advice given and whether the Council has ignored strong advice to pursue recompense.

### *Commissioner's response to the appeal*

14. The Commissioner's response to the appeal on 5 June 2024 in summary states that:
  - (a) The substance of the requested legal advice is not revealed by the overarching summary in the Report. The legal advice has therefore not lost its quality of confidence. The Commissioner therefore maintains that EIR 12(5)(b) is engaged.
  - (b) For the reasons given in the Commissioner's decision notice, the Commissioner maintains that the public interest test favours maintaining the exception.

## *The Law*

15. It is not disputed that EIR, rather than FOIA, is the applicable statutory regime in this case.
16. The panel notes that – as the Tribunal pointed out in *Kirkaldie v Information Commissioner and Thanet District Council (EA/2006/001)* – section 39 FOIA obliges a public authority to treat a request for information as falling under the EIR regime if the material sought is ‘environmental information’ as defined by EIR 2(1). We observe that, from the requester’s point of view, such treatment is advantageous because – in contrast to the FOIA regime – under EIR:
  - (a) there is a presumption in favour of disclosure;
  - (b) EIR exceptions from disclosure are more restrictive than the equivalent exemptions under FOIA; and
  - (c) (though not applicable in this case) there are no time or cost caps which would entitle the public authority to refuse a request on the grounds that it would be too time-consuming and thus expensive to respond to it.

## *Duty to make available environmental information on request – subject to exceptions*

17. EIR 5 requires public authorities that hold environmental information to make it available on request as soon as possible and no later than 20 working days after receipt of the request.
18. EIR 12(1) provides that public authorities may refuse to disclose environmental information requested if an exception applies and if:
  - ...
  - (b) *In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
19. EIR 12(2) states that public authorities shall apply a presumption in favour of disclosure but subsequent paragraphs of that Regulation provide a number of exceptions. The exception relevant to this case is:
  - (5) *...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*
    - ....
    - (b) *the course of justice...*

## *The role of the Tribunal*

20. The powers of the Tribunal in determining appeals against the Commissioner’s decisions is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or,

where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

### *Evidence*

21. Before the hearing, the parties had submitted written evidence. This comprised an Open Bundle of 68 pages (including an Index). The panel also had access to a Closed Bundle comprising the legal advice requested.
22. Mr Carroll gave oral evidence at the hearing of his appeal via HMCTS's Cloud Video Platform. The Commissioner did not attend nor was he represented.
23. At the hearing, Mr Carroll made the following additional points:
  - a. The reference in the Report to RCT having 'a reasonable case' sounds like a quote from the legal advice, in which case the substance of the advice has already been disclosed and is in the public domain.
  - b. RTC employed a contractor to design and build the dormice bridges, and another entity to supervise the works. Given the failure of a bridge during a storm, RCT should be able to reclaim from the contractor and perhaps the supervisor for the original cost of the collapsed bridge (and its twin) as well as the costs incurred as a result of its collapse. Mr Carroll would hope that Counsel's advice would have been positive about the prospects of doing so and would like to check exactly what that advice was.
  - c. Mr Carroll understands that it is RCT's prerogative not to follow legal advice it has been given but, as public money has been involved not just in designing and constructing the bridges but also the consequence of the later collapse, it is in the public interest to understand why RCT took the decision it did.
  - d. The Report suggests three reasons for RCT not pursuing litigation:
    - i. its legal advice did not guarantee success;
    - ii. the contractor had indicated it would vigorously 'fight' any claim; and
    - iii. further RCT staff time and cost would be incurred in pursuing the matter.
  - e. Mr Carroll considers that RCT have all the evidence they need to pursue a claim against the contractor, so he simply wishes to know whether RCT has followed the legal advice: he believes RCT did not.
  - f. The summary of legal advice in the Report could be inaccurate so it is in the public interest to check whether RCT made its decision on the wrong basis.
  - g. Public money has been wasted, and it is in the public interest to find out why RCT has not sought to recover it.

- h. RCT originally obtained the funds for the new bypass (including the dormice bridges) from the Welsh Government. However, RCT admits that it has neither informed the Welsh Government nor sought to recover the money from those who appear to be responsible, saying simply that the Welsh Government grant was settled 10 years ago.
- i. Whether or not this appeal succeeds such that Mr Carroll can obtain a copy of the legal advice requested, he will pursue the matter with the Welsh Government.

## ***Discussion***

### ***Possible unfairness of information being withheld from Mr Carroll***

- 24. The panel first considered the possible unfairness of the proceedings caused by the withholding of certain information from Mr Carroll.
- 25. Mr Carroll has not been provided with the information he requested. The Tribunal permitted the information to be withheld from both Mr Carroll and the public pursuant to GRC Rule 14.
- 26. For the purposes of the hearing, the panel was provided with a Closed Bundle containing the withheld information.
- 27. The panel takes account of the Tribunal's Practice Note on Closed Material. This explains that, where disclosure of the disputed information would defeat the object of the exercise, the law permits the Tribunal to deviate from the normal rule about all material seen by the Tribunal being available to all parties. However, such deviation is permissible only so far as is necessary to ensure that the purpose of the proceedings is not defeated.
- 28. The panel accepts that there is inevitably **some** prejudice in material being withheld from a party requesting it, but considers that this prejudice is mitigated by:
  - a. the Tribunal's expertise, and exercise of an investigatory rather than adversarial function;
  - b. the Commissioner being an independent, expert regulator who does not take sides. On the contrary, the Commissioner's role is to point out the strengths and weaknesses of both parties' cases in assessing the correct application of the law and regulations;
  - c. informing parties excluded from 'closed' information as much as possible with maximum possible candour in the written reasoned decision; and
  - d. in this case, the panel provides a brief 'gist' of the withheld information namely that the legal advice requested sets out various options for claiming against the contractor as a result of collapse of the bridge, and the respective pros and cons.

29. Having considered all these matters and having carefully read the withheld information, the panel is satisfied that withholding the requested information was and remains necessary to ensure the purpose of the proceedings is not defeated. Moreover, the prejudice to Mr Carroll's position – mitigated as described above – is justified in the interests of justice overall.

### *The facts*

30. The panel went on to consider the relevant facts of this case. Based on all the evidence the panel has seen and heard, the panel makes the following findings of fact. None of these is disputed.
- a. Mr Carroll had been provided with some information by RCT, such as the Report, before he made his request.
  - b. Mr Carroll does not challenge that EIR rather than FOIA is the correct statutory regime for handling of his request for information.
  - c. The collapse of the dormice bridge occurred in 2016 some 5½ years after the road opened to traffic. A second bridge of the same design was removed by RCT. The third bridge, of a different design, was left in place.
  - d. RCT carried out planting in underpasses beneath the road to mitigate reduction in the number of bridges by providing an alternative means of safe access for protected wildlife to cross the road.

### *Error of law or wrongful exercise of discretion in balancing the public interest*

#### *Is there an error of law in the Commissioner's Decision Notice?*

31. Having made the above findings of fact, the remaining issues for the panel in this case were (a) whether the Commissioner made any error of law in his decision notice and (b) whether the Commissioner wrongly exercised his discretion.
32. The panel considered first whether the exception in EIR 12(5)(b) is engaged and secondly whether the Commissioner should have exercised his discretion differently when weighing up the balance of the public interest.

#### *Does the exception in EIR 12(5)(b) – the course of justice – apply in this case?*

33. The meaning of the 'the course of justice' exception in EIR 12(5)(b) was considered by the Upper Tribunal in *DCLG v Information Commissioner & WR (2012) UKUT 103 (AAC)*, where it was accepted that:

*'...the course of justice includes in the case of the UK the particular strength and scope of legal professional privilege (LPP)...[and thus] the effects on the administration of justice generally by reason of a weakening of confidence in the efficacy of LPP which a direction for disclosure...would involve...'*

34. The panel agrees with the Commissioner's judgment that, in this case, 'legal **advice** privilege' applies, namely confidential communications between a client and professional legal advisor acting in their professional capacity and made for the sole or dominant purpose of giving or receiving legal advice. In such cases, there is no need for such advice to relate to proposed or contemplated litigation.
35. Mr Carroll however says that as the Report states that the advice received was that RCT had 'a reasonable case', the substance of the advice has already been disclosed and is therefore in the public domain.
36. The panel acknowledges that if the substance of legal advice is in the public domain, LPP has been waived and therefore the exception in EIR 12(5)(b) would not apply. However, the panel considers that somebody who has obtained legal advice and simply states the **effect** of that advice does not thereby waive LPP. We note that the courts have drawn a distinction between referring to the **effect** of advice, and the **substance** or **content** of it. Stating the strength of a party's case (or its weakness) does not in the panel's view waive LPP because it does not reveal the reasons for concluding the prospects of success.
37. Having carefully reviewed both the Report and the withheld information, the panel is satisfied not only that the legal advice requested falls within the scope of LPP but also that LPP has not been waived by the reference to that legal advice having been made in the Report.
38. We consider that the Report sets out the financial, legal, contractual and staffing implications of RCT pursuing the matter, and the risks attached to conducting litigation with no guarantee of success. These are amongst the many reasons why a local authority might choose not to pursue a legal claim even if it has 'a reasonable case' to do so. We do not accept Mr Carroll's suggestions that in this case RCT 'ignored' legal advice or that its decision was 'illogical'.
39. We conclude that the requested information falls within EIR 12(5)(b) because its disclosure would have an adverse effect on the course of justice by breaching the fundamental principle of LPP not just in this particular case but with implications going far beyond it.
40. We are therefore satisfied that the Commissioner's decision notice correctly applied the law.
41. Having found EIR 12(5)(b) engaged, the panel went on to consider whether the Commissioner wrongly applied his discretion in weighing the competing public interests.

*Did the Commissioner wrongfully exercise his discretion in balancing the public interest?*



42. The panel considered public interest factors in favour of disclosing information and maintaining the exception in EIR 12(5)(b) in this case as set out in Commissioner's decision notice namely:

In favour of disclosure:

- a. Openness, transparency and accountability around public decision-making.
- b. Particular openness on matters affecting the environment and the public purse.
- c. Enabling the public better to understand decisions RTC took in relation to the collapse of the dormice bridge.
- d. Identifying accountability and blame for the bridge collapse.

In favour of maintaining the exception:

- e. LPP is a long-standing and fundamental principle of justice. LPP safeguards the right of clients to obtain legal advice in confidence so they can take informed decisions on their legal rights.
- f. At least equally strong countervailing considerations are required to override the inherent public interest in clients being able to consult with their lawyers without fear of intrusion.
- g. Strong countervailing factors include, for example, involvement of a substantial amount of public money or a decision affecting a substantial number of people, or evidence of misrepresentation, unlawful activity or significant lack of appropriate transparency.

43. In weighing these competing public interests, the Commissioner recognised the statutory presumption in favour of disclosure under EIR, and that the exception under EIR 12(5)(b) is not absolute: it is still necessary to balance the public interests for and against disclosure.

44. The Commissioner concluded that in this case the public interest in maintaining the exception (and thus withholding the information) outweighed the public interest in disclosure taking account of the circumstances surrounding the request, both parties' arguments, the timing of the request and the nature of the withheld information. He was not satisfied that, in this case, the inherent public interest in protecting the established convention of LPP was countered by equally strong arguments in favour of disclosure.

45. We carefully reviewed the Commissioner's reasoning as well as the withheld information. We also had the benefit of hearing oral submissions from Mr Carroll.

46. We did not consider that any strong countervailing factors of the kind referred to in paragraph 42(g) above apply. Nor did Mr Carroll advance – in our judgment – any other sufficiently strong public interest arguments in favour of disclosure to outweigh

the very strong public interest in protecting LPP. Moreover, Mr Carroll accepted that even **without** obtaining the withheld information, he would approach the Welsh Government to pursue his concerns.

47. In summary, Mr Carroll has not satisfied us that the Commissioner should have exercised his discretion differently when applying the public interest test to this exception in EIR 12(5)(b). In our view, the very strong public interest in favour of withholding the information far outweighs the public interest in disclosure.

### *Conclusions*

48. For the above reasons, our answers to the questions posed at paragraph 4 above are:

**Question 1:** No.

**Question 2:** No.

49. This appeal is dismissed.

Signed:

Date: 14 October 2024



Alexandra Marks CBE  
(sitting as a First-tier Tribunal Judge)