



NCN: [2025] UKFTT 00630 (GRC)

Case Reference: EA/2023/0398

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

**Heard on the papers: 23<sup>rd</sup> May 2025  
Decision given on: 5<sup>th</sup> June 2025**

**Before**

**JUDGE ARMSTRONG-HOLMES  
MEMBER DE WAAL  
MEMBER YATES**

**Between**

**MARK BILL**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Decision:** The appeal is dismissed.

## **REASONS**

### **Background and Chronology of Events**

1. This is an appeal against the Decision Notice of the Respondent (“the Commissioner”), referenced IC-250916-C3T1, dated 11<sup>th</sup> September 2023.
2. On 5<sup>th</sup> June 2023, the Appellant made the following request to the Liverpool University Hospitals NHS Foundation Trust (“the Trust”):

*“Re 2 Can I please have copies of all the material relating to:*

*“We have issued correspondence under Pre-Action Protocol for Construction and Engineering Disputes relating to the structural defects in the Royal Liverpool University Hospital Building that required remediation.”*

*Including any responses and internal communications and communications with legal advisors, specialists and any related minutes or reports.”*

3. The Trust withheld the information under regulation 12(5)(b) of the Environmental Information Regulations 2004 (“EIR”), and on 1<sup>st</sup> August 2023, the Appellant sought a review of that decision.
4. Following an internal review by the Trust, it upheld its decision to refuse to provide the information requested.
5. On 4<sup>th</sup> August 2023, the Appellant made a complaint to the Commissioner about that refusal, submitting that the public interest in disclosing the requested information outweighs the reasons for refusing to do so.
6. The Commissioner’s decision was that the balance of the public interest favours the non-disclosure of the requested information, and that the Trust was entitled to rely upon the exception under regulation 12(5)(b) EIR. The Commissioner did not consider it necessary to view the information concerned given the specifics of the request and the Trust’s description of the information it was withholding.
7. On 12<sup>th</sup> September 2023, the Appellant submitted his appeal to this Tribunal, challenging the decision of the Commissioner on the grounds of the ‘public interest’.
8. The parties were agreeable to the determination of this appeal on the papers, that is to say, without an oral hearing. We are satisfied, pursuant to Rule 32(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, that we can properly determine the issues without a hearing.
9. We read a single OPEN bundle of 46 pages.

## **The Legal Framework**

10. The EIR apply to ‘environmental information’, which is defined as any information in written, visual, aural, electronic or any other material form on:
  - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect

the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).
11. We are content that the information concerned relates to the environment and that the EIR are the applicable regulations to be applied to this request for information.
12. A public authority that holds ‘environmental information’ is required to make it available on request (Regulation 5(1) EIR). However, there are a number of exceptions to this general provision, which are found at Regulation 12(5) EIR. The relevant exception in this case is Regulation 12(5)(b) EIR, which stipulates that a public authority:
- “...may refuse to disclose information to the extent that its disclosure would adversely affect 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.”*
13. However, even if an exception is found to apply, a public authority may only refuse to disclose the requested information if *“in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”* (Regulation 12(1)(b) EIR).
14. Regulation 12(2) requires a public authority to *“apply a presumption in favour of disclosure.”*

## **Appeal to the Tribunal**

15. The Appellant’s Notice of Appeal refers to only one ground of appeal, which is stated simply as being “Public interest”. Although there is no further detail provided by the Appellant, it is to be inferred from this that the Appellant is contesting the Commissioner’s Decision Notice on the basis that he should have exercised his discretion differently when assessing the competing public interest arguments required under Regulation 12(1)(b) EIR, having regard to the presumption in favour of disclosure under Regulation 12(2) EIR. Accordingly, this is the basis upon which the Tribunal is to consider this appeal.
16. In his response to the appeal, dated 8<sup>th</sup> December 2023, the Commissioner submitted that his assessment of the public interest test was correct, and that there is strong public interest in maintaining legal privilege wherever it is engaged. Additionally, it was submitted as follows:

- (a) That the information being withheld by the Trust consisted of communications and updates from lawyers about legal strategies to recover monies lost and is therefore subject to legal privilege.
  - (b) That there is a very strong public interest in allowing clients to speak freely and frankly to their legal advisers on a confidential basis.
  - (c) That the Trust had confirmed to the Appellant that it had entered formal pre-action protocol proceedings, and that the information therefore related to live issues. Disclosure would risk undermining the Trust's position.
17. In support of those submissions, the Commissioner has referred the Tribunal to the Upper Tribunal decision of *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC), which found that the significance of legal privilege in relation to the public interest test under Regulation 12(5)(b) EIR is broadly the same as where section 42 of the Freedom of Information Act 2000 ("FOIA") is engaged. It was further submitted that the Upper Tribunal considered in *DCLG* that weight should be attributed not only to the need to maintain legal privilege in that case, but also to the more generalised risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of the system of legal privilege.
18. The Tribunal was additionally referred to the case of *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023), where in the context of a s.42 FOIA request, the First-tier Tribunal stated that there is "*a strong element of public interest inbuilt into the privilege itself*" and that "*at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...*".
19. The Commissioner further submits that the approach in *Bellamy* was endorsed by the *High Court* in *DBERR v O'Brien v Information Commissioner* [2009] EWHC 164 QB, which held that section 42 FOIA 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."* (at para 41)
20. In *DBERR*, the Commissioner refers to the court commenting that:
- "The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight."* (at para. 53)
21. The Appellant did not provide any reply to the Commissioner's Response.

### *The role of the Tribunal*

1. The powers of the Tribunal in determining appeals against the Commissioner's decisions are set out in Part V of the Freedom of Information Act 2000 ("FOIA"), (as amended by Regulation 18 EIR). They are as follows:

**s.57 Appeal against notices...**

*(1)(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...*

**s.58 Determination of appeals**

*(1) If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

**Analysis**

22. Although the Commissioner did not view the information which is the subject of the Appellant's request, it is of course the case that correspondence issued under a Pre-Action Protocol, which relates to ongoing litigation will attract legal professional privilege. For ease of reference, the Appellant's request is set out below:

*"Re 2 Can I please have copies of all the material relating to:*

*"We have issued correspondence under Pre-Action Protocol for Construction and Engineering Disputes relating to the structural defects in the Royal Liverpool University Hospital Building that required remediation."*

*Including any responses and internal communications and communications with legal advisors, specialists and any related minutes or reports."*

23. Given that the Trust has informed the Appellant that the information it is withholding consists of communications and updates, based upon advice from solicitors about legal strategies to recover monies lost, we have no hesitation in concluding that this material is legally privileged. Accordingly, we consider that the disclosure of this material would adversely affect the course of justice, and that Regulation 12(5)(b) EIR is engaged.

24. The question for this Tribunal is therefore whether the public interest in maintaining the exception outweighs the public interest in disclosing the information (Regulation 12(5)(b) EIR).
25. Whilst Regulation 12(2) EIR requires the Trust to apply a presumption in favour of disclosure, the case law is clear to set out that the in-built public interest in withholding information to which legal professional privilege attaches commands significant weight. No specific arguments have been advanced by the Appellant in support of the contention that the public interest in disclosing the information either equals or outweighs the public interest in maintaining the exception.
26. In the absence of any countervailing arguments in support of disclosure, we find that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
27. The appeal is dismissed.

Signed

*Judge Armstrong-Holmes*

Date:

3<sup>rd</sup> June 2025