



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

**EA/2018/0052**

**Cameron MacLean**

**Appellant:**

And

**THE INFORMATION COMMISSIONER**

**Respondent:**

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**DECISION**

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**Introduction:**

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 2 February 2018 (reference FS50658640) which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 3 December 2018.

**Factual Background to this Appeal:**

[3] Full details of the background to this appeal, Mr McLean’s request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Ealing Council (“the Council”) was correct to refuse the Appellant’s request for information

regarding an application for a Sexual Entertainment Venue (“SEV”) licence under s42 (1) (legal professional privilege).

**Chronology:**

- |              |  |
|--------------|--|
| 28 Jan 2015  | Application for SEV by Blazes Club Ltd refused by the Council’s Licensing Subcommittee.  |
| 4 Feb 2015   | Solicitor for applicant contacts the Council to advise them that he had been provided with comments from the Committee on and draft Minutes of the meeting and an intention to judicially review the decision. |
| 6 March 2015 | Council concludes investigation into process of licensing committee and finds no indication of bias or preconceptions regarding the application  |
| 18 May 2016  | Appellant requests details regarding the investigation and decision to rehear the application  |
| 13 June 2016 | Council provides some information but withholds some under ss40 and 42   |
| 2 Dec 2016   | Appellant complains to the Commissioner.   |
| 18 Aug 2017  | Commissioner clarifies with the Council that 25 emails were withheld under ss40(2) and 42(1)   |
| 2 Feb 2018   | DN upholding the refusal   |

**Relevant Legislation:**

***s42 FOIA 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.

**Commissioner’s Decision Notice:**

**[4]** The Appellant’s request was as follows:

1. *Based on the information provided in response to the Previous FOIA request, please provide the following information. The steps taken in “thoroughly” investigating the allegations that the SEV application had been predetermined, including-*
  - (a) *Interviews and details of all those interviewed during the course of the investigation;*

*(b) Reports, briefings and any other documents prepared in connection with the investigation;*

*(c) Any written conclusions and/or correspondence relating to the investigation, including any findings and/or recommendations; and*

*(d) Any disciplinary investigations and proceedings taken as a result of the investigation.*

2. *Who made the decision that the SEV application should be reheard?*

3. *What authority that person has to decide that the application should be reheard; and*

4. *What legal authority was there to rehear the SEV application when –*

*(a) “The decision was made entirely properly and lawfully”; and*

*(b) The Chair of the Sub Committee, Cllr Lauren Wall, “as is the case with all decisions of the sub-committee...[had] publicly announced...a summary of the reasons for the decision”?*

**[5]** The Commissioner’s view was that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. The withheld information in this case consists of 25 emails: 9 communications between two of the Council’s solicitors, 7 between the Council’s solicitor(s) and its officers, 2 between the Council’s solicitor and the applicant’s solicitor and 7 between the Council’s Councillors and its solicitors. The Council’s position is that the emails are privileged both as individual items and as a whole body of communication, as each email was a communication for the purpose of preparing legal advice or responding to the threat of litigation. The Appellant was of the view that litigation privilege did not apply in this instance, as in his view there was no real prospect or likelihood of litigation as the Council had decided to offer the applicant a rehearing.

**[6]** The Commissioner decided that two of the emails were outside the scope of the Appellant’s request, but even if they weren’t, all the emails are covered by legal professional privilege. The Appellant made arguments that disclosure was in the public interest as the publication of the draft minutes of the Licensing Subcommittee did not give the ‘full picture’ or the legal basis for the offer of a rehearing. He believes that the Council was acting *ultra vires* in offering a rehearing, as this implies that it considered its original decision to be unsound and it wished to forestall a successful legal challenge. The Commissioner considered that the publication of the draft minutes and the disclosure of information in another FOIA request satisfied the requirements for transparency and accountability. Having viewed the requested material, she did not consider that there was

a sufficient public interest in disclosing the material that would outweigh the substantial public interest in maintaining the right and ability of legal advisors to communicate confidentially. She was of the view that the advice was “relatively recent” and live “to the extent that it could be relied upon in the future, should a similar set of circumstances arise to those in the present case.”

**Notice of Appeal:**

[7] The Appellant moved four grounds of appeal: the lack of transparency in the reasons to rehear the application; the lack of integrity and fairness in the decision to rehear the application; the lack of accountability in the democratic process; and the legal advice was neither recent nor live.

***Lack of transparency in reasons to rehear***

[8] The Appellant accepted the cited case of Bellamy v IC EA/2005/0023 in which clear, compelling and specific justifications for disclosure must be made to override privilege. In this instance, the Appellant referred to the ICO’s Guidance on the public interest test, in which she accepted that disclosure could be justified to “*remove any suspicion of manipulating the facts, or ‘spin’*” – the Appellant believed that the reason given to the Applicant and the objectors for offering a rehearing of the licensing application did not convey the full picture as regards the Council’s decision on this matter.

However, the correspondence that subsequently issued from the legal officer to concerned parties did not mention the concerns regarding the threat of litigation, which had been made by the solicitor.

***Lack of integrity in decision-making***

[9] The Appellant highlighted the integral role of objectors to the process, and argued that the decision to offer the rehearing whilst hiding the reason behind the claim that the final written decision had not been issued was unfair and an abuse of the process.

***Lack of accountability***

[10] The publication of draft minutes did not satisfy the requirement for accountability, as until they have been approved and signed as being a correct record, they cannot be relied upon.

***Advice neither recent nor live***

[11] The communications were made in 2015, and the application was voided on 19<sup>th</sup> November 2015, as the applicant had not responded to the offer of a rehearing. The Appellant argued that the communications then ceased to be topical or sensitive, as there was no longer any need to determine the application, and any subsequent application would be considered *de novo*. The advice had served its purpose by November 2015, and the Appellant cited *Kessler v IC and HMRC EA/2007/0043* to highlight the principle that “*where legal advice has served its purpose there may be a stronger public interest argument in favour of disclosure, particularly, if, in fact no harm would be created*”.

[12] In the alternative, if the advice is considered live to the extent that it could be relied upon in future, this lends weight both to the public interest in disclosure as well as maintaining the exemption: *Mersey Tunnel Users Association v IC and Merseytravel EA/2007/0052*. The Appellant emphasised the number of applications for new and renewed licences each year, and that the Council’s Statement of Licensing Policy prescribes the distribution of these licences. The fact that the advice could be relied upon in future does not preclude disclosure, as every case must be considered on its own merits. The Appellant considered that the very particular and unusual circumstances of this case made it likely that the advice was tailored to its unique circumstances, and there would therefore be little or no harm risked in disclosing it.

**Commissioner’s Response:**

[13] In response to Ground One (lack of transparency in decision to rehear), the Commissioner did not consider the exclusion of concerns that had been raised, as being of significant weight. The Council was clear that the decision to rehear arose following the Council Officer’s conversation with the solicitor.

[14] Regarding Ground Two (lack of integrity), there is no evidence that the Council treated individuals unfairly or failed to ensure a just decision-making process.

[15] Ground Three (lack of accountability) did not find favour with the Commissioner, who considered the fact that the minutes were in draft form to be “irrelevant”, as the reason that they were never formally agreed was because the decision-making process was revised by the decision to permit a rehearing. The disclosure of the draft minutes satisfies the requirement for accountability.

**[16]** The Commissioner did accept that in this case the interest in maintaining the exemption was less than in cases where legal proceedings are on going; nevertheless, the Commissioner did consider that the advice could be relied on in future cases, and as such it was still live.

**Tribunal Deliberations:**

**[17]** The Tribunal considered the above matters and further examined the following issues; whether the request was live at the time of the request and/or remains live and whether Legal Professional Privilege in fact covers the exhibits and attachments in the closed information.

**[18]** We are of the view that at the time of the request the issues were live because the Appellant was engaged in litigation that related to the issues raised and the advice was still live because the Appellant was pursuing a claim through other legal options (see page 49 at Paragraph 5 (a) of the Appellants Reply). We have looked at the documents and find they are related to the Appellant and his contract of employment and involve the “live” element of the disputed information.

**[19]** Further we consider the issues the solicitors are advising on give rise to or have the potential to give rise to another request.

**[20]** It seems the Appellant has obtained or has access to his own information as he has made a request under the Data Protection Act.

**[21]** **The** Public Authority has released some of the information requested to the Appellant which was related to his personal issues and which we assume were within the scope of the request. However we have considered the exhibits and attachments within the closed bundle and find seven of them are personal data while the others remain live and fall within the definition of Legal Professional Privilege and under the s 42 (1) exception claimed.

**[22]** We accept the Public Interest remains in non-disclosure because the disputed information is still live in so far as it could be relied upon in future similar cases.

**[23]** On consideration of the DN and for the reasons set out above we do not find the Commissioner erred in law or on the facts and accordingly refuse the appeal.

Brian Kennedy QC

Date: 14 December 2018

Promulgation date: 19 December 2018