Ian Jackson
Appellant
vs
The Information Commissioner
Respondent

In an appeal to the First Tier Tribunal (Information Rights),
case reference EA/2012/0263

REVISED GROUNDS FOR APPEAL

1. Request for consideration of revised Grounds for Appeal

1.1. I made the relevant information request to Cambridgeshire County Council on the 20th of September 2011. Following an unsuccessful request for internal review, I made a complaint to the Information Commissioner on the 17th of January 2012. On the 27th of November 2012 the Information Commissioner wrote to me with the Decision Notice.

1.2. In the Decision Notice the Commissioner rejects my complaint, concluding that the information I have requested need not be disclosed because of the exemption in Regulation 12(5)(b) of the Environmental Information Regulations.

1.3. In late December I still found myself without the legal representation I had hoped would help me with this appeal, so to protect my position I filed the Notice of Appeal on the 22nd of December with skeleton Grounds.

1.4. My attempts to find representation failed, but with the assistance of the Cambridge University Squire Law Library, and informal help from friends, I have been able to prepare a better set of Grounds.

1.5. Accordingly I request that the Tribunal consider these Revised Grounds for Appeal, rather than (or in addition to) the skeleton I submitted along with my Notice of Appeal. Alternatively, if that's not possible, I'd like the Tribunal to consider this document as my Reply to the Commissioner's Response.

1.6. I appreciate that this is somewhat awkward for the Commissioner (and perhaps for

Cambridgeshire County Council and for the Tribunal). I would of course be quite happy for the Commissioner to be given a reasonable time to put forward a revised Response.

1.7. I also appreciate that this may well lead to more delay, but given how protracted these proceedings have been so far I think that that delay would be better than the alternatives.

2. Grounds for Appeal — Litigation Privilege

2.1. The main reason given by the Information Commissioner for the refusal is that the information I have requested is covered by litigation privilege (Decision Notice ("DN") §19–32).

2.2. However, none of the documents I have requested are covered by litigation privilege, because they have all been provided to the opposing party. See *Disclosure* by Paul Matthews and Hodge M Malek QC, 4th edition ("Disclosure"), §16.09:

> **(c) Loss of confidentiality**
> As to (c), deliberate supply of a privileged document to the opposing party in litigation … would normally amount to a waiver, by depriving the document of that confidentiality which is an essential element of privilege. … Similarly, where evidence is given … by a party or his lawyer of privileged material, the privilege goes … .

Since Cambridgeshire have provided the documents to BAM Nuttall, they are no longer covered by litigation privilege.

3. Grounds for Appeal — "Course of Justice"

3.1. The Commissioner has concluded (DN §36–47) that the disclosure of the information (including both information the Commissioner wrongly thinks is covered by litigation privilege, and information which the Commissioner agrees is not) would nevertheless have an adverse effect on the course of justice (as Regulation 12(5)(b) puts it).

3.2. The structure of the DN makes it difficult to see what that adverse effect is considered to be. The DN does not clearly set out the harm anticipated by the Commissioner.

3.3. Perhaps the clearest statement of the Commissioner's thinking is in DN §52:

> 52. Inherent in regulation 12(5)(b) is the argument which says that the course of justice should be allowed to play out, away from the hindrance of outside comment and interference.

Similar comments about the supposed "confidentiality" of proceedings are made in DN §38 ("Much like the notion of legal professional privilege … [this] exception is designed to ensure that proceedings can go forward unhindered"—as if open justice were justice "hindered"), §41 (disclosure—that is, discovery, i.e. between parties to a case—is said to be confidential), §42 ("information shared during a … case [has a] confidential nature" and has an "expectation of confidentiality").

3.4. However, of course, the process of justice is normally an open one. As Halsbury's *Laws of England* (5th edition) has it (vol.61 §643):

> 643. **Openness of judicial proceedings**. The general public are entitled to see for themselves that justice is done. … Nor may any exercise of the court's inherent power to control the proceedings depart from the general rule of open justice to any greater extent than is necessary to serve the ends of justice.

As the Law Lords said in Scott and Anor v Scott [1913] UKHL 2, [1913] AC 417:

> … public trial is to be found on the whole the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect.

Therefore the starting point should be the presumption that the interests of justice would be served by public disclosure of documents supplied by the parties to the adjudicator.

3.5. The DN gives a number of hints as to the problems that might follow from disclosure. These fall short of clear statements of the anticipated harm, but it would be helpful to consider them:

3.6. DN §42 refers to a fear of outside criticism, which might follow disclosure. "This confidentiality is meant to ensure that both parties can conduct themselves without fear of outside criticism while the dispute was [sic] still live". However, fear of criticism is not a relevant objection to disclosure:

(a) Insofar as the criticism would be justified, both the interests of justice and the public interest would be served by disclosure.

(b) Conversely, the possibility of unjustified criticism because of misunderstandings by the public is not a relevant consideration. "The Tribunal has rejected as a relevant consideration the possibility that members of the public might be confused by the information disclosed", Phillip Coppel, *Information Rights* (3rd ed.) §15-016.

Therefore the possibility of outside criticism (or the parties' fear of it) is not a reason to think that disclosure would harm the course of justice.

3.7. DN §46 suggests that disclosure might make the parties "less free and frank in the extant proceedings". It is not clear exactly in what way, in the current proceedings, the Commissioner thinks the parties are presently being "free and frank"; rather, in adversarial proceedings over millions of pounds parties are normally extremely careful and guarded in their correspondence. Perhaps the reference is to settlement negotiations; but this is not relevant because I am not asking for any documents which are part of settlement negotiations.

4. Grounds for Appeal — Without Prejudice

4.1. DN §45 refers to material which is said to be "without prejudice" material. "An adjudication process is one in which the parties can submit evidence 'without prejudice'. … The concept of 'without prejudice' is to reassure parties as to the confidentiality of … [negotiations]."

4.2. But the rule on without prejudice material is a rule of admissibility of evidence, and does not relate to confidentiality. *Disclosure* §14.02:

> The basic rule of evidence is that evidence [of] admissions … made … in the course of genuine negotiations to settle … is inadmissible.

The rationale is (Cutts v Head [1984] Ch.290 §306):

> … that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings …

As Henry Brown and Arthur Marriott have it in *ADR Principles and Practice* (3rd ed.) 23-040:

> A distinction needs to be made between confidentiality, which concerns the withholding of information from all sources [sic, 'recipients'?] including the public and courts, and privilege, which relates specifically to the admissibility of information in the courts.

4.3. So there is no rule of information rights law exempting without prejudice information from public disclosure. Even if any without prejudice information were publicly disclosed, the Technology and Construction Court would still not admit it as evidence so it would not prejudice the parties' positions in the ongoing legal proceedings.

4.4. In any case, this information is not part of a settlement negotiation. It may have been labelled "without prejudice", but the mere marking of documents with that phrase does not extend the without prejudice rules to a document prepared and sent for some other purpose. In this case, the purpose for which the documents were prepared and sent was to make the parties' respective cases in front of the adjudicator.

4.5. I believe that all (or nearly all) of the information I am requesting has also been submitted as evidence, or will be submitted as evidence in some form, to the Technology and Construction Court. That also demonstrates that it cannot be "without prejudice" material since such material is inadmissible (save as to costs).

4.6. In summary, there is no reason to suppose that the course of justice would be harmed by the

public disclosure of the information I have requested. Rather, currently, the adjudication proceedings are shrouded in secrecy contrary to the principles of natural justice.

5. Grounds for Appeal — Confidentiality of Arbitration

5.1. Although not clearly stated, the most likely basis for the Commissioner's contention that the adjudication proceedings should be confidential, is the idea that arbitration is in general confidential and that that confidentiality should therefore be upheld in this case.

5.2. I agree that the Busway adjudication resembles arbitration proceedings so that similar principles should apply. And it is true that the courts generally uphold the confidentiality of arbitration proceedings between private parties (where that forms part of the arbitration agreement).

5.3. However, it is not the case that confidentiality of arbitration is a general rule of law. Confidentiality

> … [arises] from the arbitration agreement rather than from any privilege attaching to information used in or relating to the arbitration.

(David St John Sutton, Judith Gill, Matthew Gearing, *Russell on Arbitration*, 23rd ed., 5-172)

5.4. Confidentiality of arbitration, where agreed, is tolerated as part of the effort to encourage parties to use alternative dispute resolution. It is as part and parcel of the parties' ability to control the arbitration process:

> 1. … (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(Arbitration Act 1996)

5.5. So the confidentiality of arbitration arises not from the interests of justice (and indeed the confidentiality of proceedings — even adjudication or arbitration — is generally against the interests of justice) but rather from the confidentiality obligations in the arbitration agreement. Thus this confidentiality provision does not provide a justification for an exemption under EIR 12(5)(b) (interests of justice). Rather it needs to be considered under EIR 12(5)(f) (third party information, "voluntary supply" as the DN calls it), which

deals with environmental information held by a public authority whose disclosure might prejudice the rights of a third party who supplied the information.

6. Grounds for Appeal — Breach of Confidence

6.1. The Commissioner does not deal with the Council's reliance on the EIR exemption 12(5)(f). However, as explained above, to properly consider the supposed confidentiality of arbitration documents it is necessary to analyse the situation by reference to 12(5)(f), which states:

> (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—
>
> …
>
> (f) the interests of the person who provided the information where that person—
>
> (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
>
> (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
>
> (iii) has not consented to its disclosure; …

6.2. In relation to documents originating from the Council, this exemption does not apply.

6.3. In relation to documents originating from BAM Nuttall, (f)(i)-(iii) appear to be satisfied (although it is perhaps arguable that the supply by BAM Nuttall of these documents in the adjudication was not in fact entirely voluntary, given that the adjudication process was one which BAM was bound by contract to follow). It is therefore necessary to consider the putative harm that would occur as a result of disclosure, and to consider the public interest (since this exemption is subject to a public interest test).

6.4. Firstly, only harm to the counterparty (BAM Nuttall in this case), and not harm to the public authority, is to be considered. So suggestions that the Council's position might be compromised somehow are not relevant for 12(5)(f).

6.5. Considering the harm to BAM Nuttall, the Council's Internal Review document puts it like this:

> The potential harm that could come to BAM Nuttall on the release of this information at this time could be a weakened position in relation to the litigation …

(Cambridgeshire Internal Review s2.)

6.6. Firstly, we need to consider whether harm will actually occur. As Coppel puts it (*Information Rights* 25-066) "a mere likelihood is not sufficient". It has not been argued, and indeed it seems unlikely, that disclosure would result in an unjustified prejudice to BAM Nuttall's position.

6.7. Conversely, we need to consider whether disclosure might result in a prejudice to BAM Nuttall's position but a prejudice which is indeed justified by the situation. If such a prejudice were to occur it would be in the public interest: it cannot be in the public interest for BAM Nuttall to "get away" with something only by virtue of keeping the public in the dark.

6.8. Therefore even if any harm might result to BAM Nuttall from disclosure, it would be in the public interest for that disclosure (and the harm) to occur.

7. Grounds for Appeal — "Discouraging" arbitration

7.1. In DN §43, it is suggested that "[Parties may] be less willing … to enter into voluntary systems designed to resolve disputes, such as adjudications".

7.2. It is true that in general one reason why private bodies (particularly, companies) prefer arbitration and adjudication is that it allows them to agree to manage the dispute in private and thus to avoid the adverse publicity associated with a public dispute.

7.3. However, this is not a legitimate consideration for a public authority. As opposed to a private company which serves, and is responsible to, its members (shareholders), the public has a strong interest in seeing that a public authority conducts its affairs properly and efficiently.

7.4. Furthermore, in practice it is unlikely that if the confidentiality of this adjudication is not upheld, public authorities will become more reluctant to enter into arbitration and

adjudication agreements.

7.5. Firstly, lack of confidentiality in the adjudication would not in itself discourage adjudications, since the alternative would be court action (which would certainly not be confidential) or capitulation (which is bureaucratically strongly disfavoured and would also be open to FOI/EIR scrutiny).

7.6. Secondly there are many other reasons why an organisation might enter into an arbitration agreement, and these are in no way undermined if confidentiality is not available. Adjudication is still a lot faster and cheaper than litigation, and still provides the parties a great deal more control over the process. In this particular case — a construction contract — an adjudication term is a standard part of the model contract.

7.7. So in summary a failure to honour the confidentiality of the adjudication as agreed by the parties removes at most one minor reason for public bodies and their counterparties to choose arbitration agreements.

8. Grounds for Appeal — Public Interest in the Busway

8.1. In DN §49–51 the Commissioner recognises the importance of the dispute over the Cambridgeshire Guided Busway.

8.2. The project has not only been controversial right from the beginning, it has also been very late and it is already clear that it has cost the taxpayers of Cambridgeshire a large amount of money. Exactly how much more it will cost will mostly depend on the court case.

8.3. There have already been clear indications of mismanagement of the project by Cambridgeshire. For example, previous information requests have revealed that Cambridgeshire attempted to oversee the £200M project without the assistance of a formal issue tracking system, instead relying on ad-hoc wordprocessor documents passed around in email.

8.4. Under the circumstances, it is extremely important for the public to be able to see the details of the dispute between Cambridgeshire and BAM Nuttall. At the moment we have very little hard information.

8.5. In DN §58 the Commissioner is concerned that release of this information might "distract"

the Council. It is not clear what form exactly this distraction is supposed to take, but the most plausible interpretation is that the Council could be exposed to public criticism based on the information released, and might divert resources or attention into public relations and media management. As I have explained above, fear of criticism of the public authority is not a relevant consideration when dealing with an information request.

8.6. Likewise it is not clear what form the "upset" to the proceedings contemplated in DN §58 might take, if not some kind of reaction to public criticism (whether justified or unjustified).

8.7. The EIR take a narrow view of exemptions — narrower than FOI. On the public interest test in EIR, Regulation 12(2) says:

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

which is a significant difference from FOI:

> the express provision of a presumption in favour of disclosure is significantly different [to the regime in FOIA]

(Burgess v IC and Stafford, [2007] UKIT EA_2006_0091, §36) and

> … the grounds for refusal to disclose should be interpreted in a restrictive way. It follows that any exception to such a ground should be given a broad interpretation.

(Ofcom v IC and T-Mobile, [2007] UKIT EA_2006_0078, §25)

8.8. Consequently, if I am wrong and there is some possibility of harm to the course of justice (such as a hypothetical reluctance to engage in adjudication in the future), the public interest in disclosure in this particular case is overwhelming.

9. The Commissioner's Response

9.1. I appreciate the difficulties caused by my procedural approach, as referred to in §16 of the Response. Of course I have no objection to the Tribunal allowing the Commissioner a reasonable window to respond.

9.2. In Response §27, the Commissioner appears to misunderstand my point about the public administration of justice, and to conflate the interests of justice with the public interest. It

is right to consider the public administration of justice as being in the interests of justice, in its own right; this should not be treated merely as part of the public interest test. I have set this out more fully and clearly in these Revised Grounds.

9.3. Apart from that, these Revised Grounds for Appeal are the best answer I have to the Commissioner's Response.

10. Conclusions

10.1. The information I have requested is not covered by litigation privilege, and is not without prejudice material. Insofar as confidentiality of arbitration is a consideration, this falls to be considered under exemption 12(5)(f) (third party information). Therefore, there would be no harm to the interests of justice from disclosure and the justice exemption 12(5)(b) is not engaged.

10.2. If there would be any harm to the interests of justice, that harm is outweighed (separately from the public interest test) by the benefits to the interests of justice inherent in justice being done in public. Therefore overall the interests of justice are served by disclosure.

10.3. Disclosure would not harm the interests of BAM Nuttall, except insofar as any such harm (such as public criticism) would be justified and therefore in the public interest. Therefore exemption 12(5)(f) (third party information) does not justify nondisclosure.

10.4. This is a high-profile, high-value case regarding a public project which has already gone badly wrong and which is now playing out in litigation. So if I am wrong about the exemptions, the public interest in disclosure is overwhelming.

11. Procedure — other exemptions

11.1. Cambridgeshire, in its refusal, relied not only on the "course of justice" exception in Regulation 12(5)(b), but also on Regulations 12(5)(d) (public authority proceedings) and (f) (third party information). However, these exemptions were not dealt with in the Commissioner's Decision Notice.

11.2. I have addressed 12(f) (third party information) above, as it is the appropriate framework for considering whether an exemption applies by virtue of confidentiality of arbitration

proceedings.

11.3. 12(5)(d) is dealt with only in passing in the Council's Internal Review (s2) and seems to be mixed up there with the consideration of 12(5)(f). It is difficult to set out an appropriate appeal in relation to 12(5)(d), particularly in the absence of any relevant sections in the Decision Notice. I have therefore not addressed 12(5)(d) here.

11.4. If any exemptions besides 12(5)(b) and 12(5)(f) are to be considered, I would like the Tribunal to ask the Information Commissioner to put forward its position on the other grounds of the Council's refusal, and allow me to reply.

11.5. In any case if the Tribunal proposes to substantively consider an exemption other than that in Regulation 12(5)(b) or 12(5)(f), please would the Tribunal let me know and give me time to prepare a position on the other exemption(s).

12. Procedure — hearing

12.1. I would like an oral hearing. As a litigant in person I feel that this will best allow me to put forward my arguments and indeed best allow the Tribunal to assist me.

12.2. I am happy for the hearing to be held in London. I do not run a car so a hearing in a location ill-served by public transport would be inconvenient for me; London and Cambridge are by far more convenient than most other places.