



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0097

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50503882

Dated: 24 March 2014

Appellant: The Bingham Centre for the Rule of Law

Respondent: Information Commissioner

Heard at: Fleetbank House, London

Date of hearing: 10 September 2014

Date of decision: 19 September 2014

Before

Angus Hamilton

Judge

and

Narendra Makanji

and

Henry Fitzhugh

Subject matter: Freedom of Information Act 2000 s 42

Cases considered: *R v Special Commissioner of Income Tax* [2003] 1AC 563

R v Derby Magistrates Court ex p B [1996] AC 487

Bellamy v ICO EA/2005/0023

Pugh v IC and MOD EA/2007/0055

Calland v ICO & FSA EA/2007/0136

DBERR v O'Brien and ICO [2009] EWHC 164 (QB)

Szucs v ICO EA/2011/0072

Crawford v ICO & Lincolnshire County Council EA/2011/0145

Cabinet Office v ICO and Aitchison [2013] 2 Info LR 336

GW v ICO and ors [2014] UKUT 0130 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

By a majority the Tribunal allows the appeal for the reasons given below and consequently substitutes the original Decision Notice with the Decision Notice set out below.

SUBSTITUTED DECISION NOTICE

Freedom of Information Act 2000 (FOIA)

Date: 19 September 2014

Public Authority: Home Office

Address: 2 Marsham Street
London

Complainant: The Bingham Centre for the Rule of Law

Address: Charles Clore House
17 Russell Sq
London WC1B 5JP

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 24 March 2014.

Action Required

The Home Office is to provide a copy of the information requested by the Bingham Centre for the Rule of Law in their letter of 13 November 2012.

The Home Office must take these steps within 35 calendar days of the date of this substituted decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Dated this 19 September 2014

Signed

Angus Hamilton DJ(MC)

Judge

REASONS FOR DECISION

Introduction

1 s.1(1) of the Freedom of Information Act provides that:

Any person making a request for information to a public authority is entitled:

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

2 s.42 of the Freedom of Information Act provides that:

(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.

3 s.42 provides a qualified exemption and it is also necessary to consider whether:

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (S.2 FOIA).

The Tribunal refers to this as the public interest balancing test (PIBT).

Request by the Bingham Centre for the Rule of Law (the Bingham Centre)

4 On 13 November 2012 the appellant requested information from the Home Office in the following terms: *Please would you supply us with the following information: a copy of the independent legal advice referred to in the report, 'Intercept as Evidence' (Cm7760) (December 2009).*

- 5 On 11 January 2013 the Home Office told the appellant that the requested information was exempt from disclosure. The Home Office relied on the FOIA exemptions in s24(1) (national security), s31(1) (law enforcement), s35(1) (formulation of government policy) and section 42(1) (legal professional privilege). Additionally the Home Office relied on section 23 FOIA to neither confirm nor deny whether it held information supplied by or relating to bodies dealing with security matters.

- 6 The appellant sought an internal review on 10 March 2013. The Home Office eventually responded on 18 June upholding its original analysis but clarifying that it was claiming that the s.42(1) exemption applied to all the withheld information.

- 7 The appellant complained to the Commissioner on 18 June 2013. That complaint resulted in the Decision Notice of 24 March 2014. That Decision Notice records that during the Commissioner's investigation the Home office dropped its reliance on the s 23(5), 24(1) and 31(1) exemptions but continued to maintain that s42(1) applied to all the withheld information and that '*s.23(1) applied to parts of the withheld information*' (DN p2). The Decision Notice fails to make any mention of the originally claimed exemption under s.35(1) in this context or whether the Home Office continued to rely on it. The Tribunal were left unclear whether the abovementioned reference to s.23(1) should have been a reference to s.35(1).

- 8 In any event the Commissioner decided in the Decision Notice to consider only the application of s42(1) to the withheld information and did not consider any of the other exemptions claimed by the Home Office. The Decision Notice concluded that s42(1) was engaged and that the PIBT favoured the maintenance of the exemption – noting in particular the comments in *Bellamy* that *‘there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.’*

The Appeal to the Tribunal

- 9 On or about 22 April 2014 the appellant submitted an appeal to the Tribunal (IRT).
- 10 In the Grounds of Appeal the appellant conceded that s42(1) was engaged but disputed that the PIBT favoured maintaining the exemption. The appellant considered that the Commissioner’s analysis of the factors to be considered in evaluating the PIBT was fundamentally flawed.

The Questions for the Tribunal

- 11 The Tribunal judged that the sole question for them to consider was whether the PIBT favoured maintaining the exemption or disclosure in relation to the engaged s42(1) exemption.

Evidence & Submissions

- 12 This matter was considered by the Tribunal by way of an oral hearing on 10 September 2014 with no live witnesses. The Tribunal received and heard oral

and written submissions from the parties and the Tribunal members are grateful to all the parties for the effort they had clearly put into the preparation of their submissions.

13 It should be noted that the Home Office was not joined as a party to the proceedings and had made no application to be joined. The Tribunal was frankly puzzled by this. The Decision Notice dealt only with the s.42(1) exemption and that appellant's appeal was solely in relation to that exemption. It was clear from the history of the matter that the Home Office had sought to raise other exemptions (although the history of raising and abandonment was unclear). The Tribunal considered that it was limited to considering the s.42(1) exemption alone as this was the subject matter of the Decision Notice. Had the Home Office been joined it would, of course, been able to ask the Tribunal to consider other exemptions. The net result is that the disclosability of the withheld information has only been considered in part rather than in full.

14 The appellant raised what might reasonably be described as a preliminary issue about whether the advice was originally provided to the Home Office or another body. The appellant argued that there were indications that the advice was provided to the Privy Council or the Advisory Group of Privy Councillors. The appellant could not say definitively that this was the case as they had not seen the advice in question. Although the Tribunal listened carefully to the appellant's arguments on this point it did not consider it necessary to determine the issue and did not consider that anything of significance turned on the issue. The Tribunal was satisfied that the advice

was clearly for the ultimate benefit and use of the Home Office as it was the relevant decision-making body.

- 15 The Tribunal considered that the Commissioner had outlined the appropriate approach towards the consideration of the PIBT – that is to identify and examine the factors which favoured disclosure and those which favoured maintaining the exemption and to evaluate each thereby reaching a conclusion as to whether the PIBT favoured maintaining the exemption or favoured disclosure.

- 16 The factors favouring maintaining the exemption identified by the Commissioner included the inherent strength of the concept of legal professional privilege (LPP). At common law LPP was an absolute bar to disclosure. FOIA effectively provided an exemption to the absolute bar but the importance of LPP meant that even in the context of FOIA what was required was a *'clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute, which will be information that the client supposes to be confidential (e.g. Calland v ICO & the Financial Services Authority (EA/2007/0136), para 37; Szucs, para 28(ix); Crawford v ICO & Lincolnshire County Council (EA/2011/0145), para 12)'*.

- 17 The Commissioner identified the following general factors which favoured maintaining the exemption in all cases where LPP was raised:

The importance of encouraging full frank and uninhibited discussions between clients and lawyers and the way in which that would be discouraged if clients knew that there was a risk of disclosure; the impact in turn on the quality of the advice given and the quality of the decision-making by the client and the likely impact on record-keeping if client and lawyer were aware that the record might be liable to disclosure.

- 18 The Commissioner identified the following specific factors which favoured maintaining the exemption in this particular case:

- The advice relates to an issue which is very much “live”. The Government is still deciding whether it should introduce intercept evidence in courts.
- The disclosure of the legal advice would reveal in full the lawyers’ consideration of legal issues surrounding the introduction of an intercept model, and would advantage those who oppose the Government’s position (not presently to introduce a model) to challenge it.
- The ‘Intercept as Evidence’ report already contains clear summaries of the legal advice sought by the request and this

enables those who wish to engage with the reasoning. This in turn lessens the reasons for more full disclosure.

19 The Commissioner identified the following factors which favoured disclosure:

- The debate over whether intercept should be used is an important one affecting in particular the safety of the general public and fair trial rights and on which different people have different and strongly held views, that there is a public interest in that debate being better informed, and that disclosure would serve that interest.
- Disclosure would serve the general public interest in transparency and accountability in public decision-making which disclosure of legal advice relied on by Government will invariably improve.

20 The appellant identified the following factors which favoured disclosure:

- The interests underpinning LPP are absent due to the cross-party nature of the issue and the cross-party consensus over the need to allow intercept as evidence.
- The disclosure of the legal advice would involve no possibility of prejudice to the government's interests.

- The 'live' nature of the issue was a factor favouring disclosure rather than maintaining the exemption as disclosure would enable public debate over potential legislative changes.
- Disclosure would strengthen the government's own development of its policy – again through public debate.
- Disclosure would assist the administration of justice through public debate.

Conclusion

- 21 The Tribunal felt that the Commissioner had largely correctly and fairly identified the issues to be considered with regards to the PIBT. The Tribunal did however consider that the third point mentioned at paragraph 18 above relating to the partial disclosure of the advice was more likely a point in favour of disclosure since there had already been a significant partial waiver of LPP.
- 22 A majority of the Tribunal however considered that the factors in favour of disclosure identified by the Commissioner were weightier and more significant than the factors favouring maintaining the exemption. A majority felt that the factors favouring disclosure did amount to a '*clear, compelling and specific justification*' that was weightier than the public interest in protecting the information in dispute.

- 23 A majority of the Tribunal, having read the actual legal advice which constitutes the disputed information, was strongly of the view that the arguments around whether intercept should be admitted as evidence should be public and that the difficulties in implementing a workable 'intercept as evidence' system should be an open public debate. All the arguments both for and against such a system should be aired in public with the various interest and pressure groups having an opportunity to consider existing legal (and other) opinions and to respond to them. The majority felt that there would be an ultimate benefit in developing a good sound workable 'intercept as evidence' system through such public debate and that the detrimental effect of disclosure was negligible if not non-existent.
- 24 A minority of the Tribunal came to the opposite conclusion and considered that the Commissioner's assessment of the factors for and against disclosure was correct and that the PIBT favoured maintaining the exemption.
- 25 Because of the majority's assessment of the factors identified by the Commissioner which favoured disclosure or retention of the exemption the Tribunal did not find it necessary to consider the factors raised by the appellant in detail although the appellant's general submissions were taken into account in evaluating the factors identified by the Commissioner.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 19 September 2014