IN THE FIRST-TIER TRIBUNAL **EA/2011/0072**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50351439
Dated: 16 February 2011

Appellant: GRACE SZUCS

Respondent: THE INFORMATION COMMISSIONER

On the papers

Date of hearing: 5 July 2011

Date of Decision: 16 August 2011

Before

Annabel Pilling (Judge)
Richard Fox
Jean Nelson

Representation:

For the Appellant: Grace Szucs
For the Respondent: Ligia Osepciu, Mark Thorogood

Subject matter:

FOIA Qualified exemptions – Legal Professional Privilege s.42
FOIA Public interest test s.2

Cases:
Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013*)*
*Department for Education and Skills v IC and Evening Standard (*EA/2006/0006)
Department for Business, Enterprise and Regulatory Reform v O'Brien and Information Commissioner [2009] EWHC 164 (QB)
Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin)
Department for Culture Media and Sport v Information Commissioner (EA/2008/0065)
Department of Trade and Industry v Information Commissioner (EA/2006/0007)
Department for Business Enterprise and Regulatory Reform v O'Brien and Information Commissioner [2009] EWHC 164 (QB)
Calland v Information Commissioner and FSA (EA/2007/0136)
Mersey Tunnel Users Association v Information Commissioner (EA/2007/0052)

Decision

For the reasons given below, the Tribunal upholds the Decision Notice of 16 February 2011 and dismisses this Appeal.

Reasons for Decision

Introduction

1. This is an Appeal by Mrs Grace Szucs against a Decision Notice issued by the Information Commissioner (the "Commissioner") dated 16 February 2011. The Decision Notice relates to a request for information made by Mrs Szucs to the Intellectual Property Office ("IPO") under the Freedom of Information Act 2000 (the "FOIA"). The information was withheld on the basis of the exemption provided for in section 42(1) of FOIA, which applies to information covered by legal professional privilege, and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Factual Background

2. There is a relatively complex background to this Appeal. The withheld information in this case is the legal advice and associated documents provided to the IPO in respect of how to deal with a previous request, for different information, under FOIA made by Mrs Szucs' husband, Mr Andras Szucs. That request was made in the context of a long-running dispute between Mr. Szucs and the IPO in relation to its treatment of his complaint against a patent agent who had conducted an inquiry under the Register of Patent Agent Rules ("RAPR")[1] arising from another dispute between Mr. Szucs and his former employer about certain patent applications. Since 1990, Mr. Szucs has pursued his complaints against that patent agent and the IPO in a number of different forums.

3. In 2005, Mr Szucs made a request under FOIA to the IPO for access to all relevant files on his complaint going back to 1989, as outlined in his earlier correspondence. The IPO disclosed almost all of the material referred to, apart from a letter from the relevant patent agent dated 21 November 1989 which set out the response of the patent agent to the complaints made by Mr Szucs. This letter was withheld on the

[1]Whilst this is irrelevant to this case, Mr and Mrs Szucs do not accept that this was a genuine inquiry and this remains an area of dispute for which alternative dispute resolution is sought.

basis that it was exempt from disclosure under section 32(2)(a) of FOIA[2]. That the IPO was entitled to rely on section 32(2)(a) of FOIA was upheld by the Commissioner[3], on appeal by this Tribunal[4] and by the High Court[5].

4. The Commissioner has considered two earlier cases that concern the same disputed information as in this case, that is, the IPO's legal advice in respect of dealing with Mr Szucs's original request for information made in 2005: FS50300314 – the information was the requestor's personal data and therefore the IPO should have applied section 40(1) of FOIA. FS50301299 – the information was withheld correctly under section 42(1) of FOIA (legal professional privilege).

The request for information

5. On 27 July 2010, Mrs Szucs made a request to the IPO in a detailed letter, explaining that she believed there was a compelling public interest in disclosure:

> *"To describe the information I would like you to provide now I quote from the Decision Notice of the Information Commissioner for case FS50301299 that has dealt with an earlier request for the same information and which would include:*
>
> > *A copy of the legal advice itself dated 23 March 2005 ['item 1']*
> > *An email requesting legal advice about making the response under the Act ['item2]*
> > *Covering email relating to the legal advice itself ['item 3']*
> > *A second email requesting further advice ['item 4])*
> > *An email providing further advice ['item 5']*
> > *An email acknowledging and discussing the further advice ['item 6]""*

6. On 16 August 2010, the IPO issued its response, refusing the request and explained that the situation had not changed from when the Commissioner issued the Decision Notice in FS50301299; the documents in question contain advice from,

[2] Section 32(2)(a) is an absolute exemption covering information that is held by a public authority if it is held only by virtue of being contained in any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
[3] Decision Notice FS50099396
[4] EA/2007/0075

or discussions with, the IPO's legal advisers and are covered by the exemption in section 42(1) of FOIA. It explained that in making this decision it balanced any public interest in release of this information against the public interest in maintaining and applying legal professional privilege in this case. It explained that it was not prepared to offer an internal review in the circumstances of this case.

The complaint to the Information Commissioner

7. Mrs Szucs contacted the Commissioner on 16 September 2010 requesting an investigation into the handling of her request for information. She provided the Commissioner with a transcript of the High Court case and asked the Commissioner to consider a number of specific points, which are repeated in detail in the Commissioner's Decision Notice.

8. The Commissioner investigated the substantive complaint, and issued a Decision Notice on 16 February 2011. He concluded that the IPO was entitled to withhold the disputed information on the basis that it fell within the exemption in section 42(1) of FOIA and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Appeal to the Tribunal

9. Mrs Szucs appealed to the Tribunal on 15 March 2011.

10. The Tribunal did not join the IPO as a Second Respondent in light of the history of this matter and the amount of information on the relevant issue already available.

11. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents.

[5] [2009] EWHC 3186

12. In addition, the Tribunal was provided with a copy of the disputed information. This was not made available to Mrs Szucs as to disclose it to her would defeat the purpose of this Appeal. In order to preserve the confidentiality of the disputed information we have not referred to its contents in this Decision.

13. Although we may not refer to every document in this Decision, we have considered all the material placed before us. We have considered in detail the written submissions from the parties, in particular the detailed submissions from Mrs Szucs, who has not been represented in these proceedings.

The Powers of the Tribunal

14. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

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

15. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

16. The question of whether the exemption in section 42(1) of FOIA is engaged and whether the consequential public interest test was applied properly are questions of law based upon an analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The Issues for the Tribunal

17. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

18. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)). Section 42(1) of FOIA is a qualified exemption.

19. Mrs Szucs accepts that the disputed information falls within the exemption in section 42(1) of FOIA as information in respect of which a claim for legal professional privilege could be maintained in legal proceedings, and she appeals on one ground; that the Commissioner erred in concluding that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

20. Within her Grounds of Appeal and written submissions, Mrs Szucs addresses other issues that are irrelevant to the issues before the Tribunal; for example, whether the RPAR inquiry was genuine and whether the IPO should engage in some form of Alternative Dispute Resolution ("ADR") with Mr Szucs over both the disputed patents and his complaint against the patent agent. These matters are outside the scope of this Appeal and not within jurisdiction of this Tribunal. We appreciate that Mrs Szucs may have misunderstood the jurisdiction of this Tribunal, or wished it to consider matters outside its jurisdiction to give guidance, but we do not fulfil an "Ombudsman" role and it is not for us to judge how the IPO handled the patent dispute between Mr Szucs and his ex-employer or the complaint against the patent agent.

Submissions and Analysis

21. Section 42(1) of FOIA provides as follows:

> *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.*

22. The Tribunal considers that the meaning and effect of section 42(1) of FOIA is clear. The only question for the Tribunal can be whether, in respect of the information requested, under English law a claim to legal professional privilege could be maintained or whether under Scots law a claim to confidentiality of communications could be maintained in legal proceedings. If the answer is "yes",

the information falls within the scope of section 42(1) of FOIA and the qualified exemption is engaged.

23. 'Legal professional privilege' is a set or rules or principles designed to protect the confidentiality of legal communications and covers information from a client to a legal adviser for the purpose of seeking advice, the communications in which the advice is given and certain communications between a lawyer and third parties for the purposes of preparing for or conducting litigation. There are two distinct categories of legal professional privilege: legal advice privilege and litigation privilege. In this case, all six items of correspondence are covered by legal advice privilege: each is between a client, the IPO, and a lawyer acting in a professional capacity, for the sole purpose of obtaining and providing legal advice, and imparted in circumstances that led to an expectation of confidence. It is irrelevant that the advice came from an employed "in-house" lawyer. The advice of the IPO's legal advisers was sought in respect of whether the letter of the patent agent in rebuttal of Mr Szucs' complaint in 1989 should be disclosed or not under FOIA[6]. As indicated above, it is accepted and, having seen the disputed information, we agree, that the disputed information falls within the scope of section 42(1) of FOIA.

24. Mrs Szucs appears to argue that legal professional privilege has been waived because the instructions, dated 8 March 2005, requesting the legal advice have been disclosed:

> *"I attach, as we agreed, a copy of the complaint against the Patent Agent [name] that was made by Mr Szucs in 1989.*
>
> *As I explained when we spoke, this is a complaint about actions taken in a professional capacity and whilst we are sympathetic to [the Patent Agent]'s feelings on this matter, we would wish to be able to give Mr Szucs all the documentation in our possession……"*

25. This does not refer to the legal advice that is the disputed information. We agree with the Commissioner that the disclosure of these instructions does not amount to waiver of the legal professional privilege that attaches to the six items identified as

[6] It does not cover, for example, the validity or otherwise of the RPAR inquiry.

the disputed information in this case, and which followed this initial request for the legal advice.

26. Consequently we are satisfied that the exemption in section 42(1) of FOIA is engaged. We therefore move on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Public Interest Test: General Principles

27. We agree with Mrs Szucs's submission that there is no absolute exemption from disclosure for information falling within the scope of legal professional privilege and we must therefore consider where the balance of the public interest lies in respect of the disputed information.

28. There have been a considerable number of decisions by this Tribunal on the issue of legal professional privilege, both under the FOIA and the Environmental Information Regulations 2004. The Panel Members of this Tribunal have sat on a number of these cases and are familiar with the arguments advanced by each party. It is not necessary or helpful for us to set down in this Decision a detailed review of those cases. We consider that the following principles, drawn from relevant case law, are material, both generally and with particular reference to section 42(10 of FOIA, to the correct approach to the weighing of competing public interest factors. We note that the principles established by these cases do not form a rigid code or comprehensive set of rules and we are, of course, not bound by decisions of differently constituted Panels of this Tribunal. We regard them as guidelines of the matters that we should properly take into account when considering the public interest test but remind ourselves that each case must be decided on its own facts.

(i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act

permits it to be withheld *(Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC*[7]*.*

(ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information (see, for example, *Department for Education and Skills v IC and Evening Standard*[8]).

(iii) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.

(iv) The mere fact that legal professional privilege applies to information is insufficient to justify non-disclosure. A public authority is only entitled to refuse to disclose such information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

(v) The approach for the Tribunal is to acknowledge and give effect to the significant weight to be afforded to the exemption, to ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least[9].

(vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. While these may be of a general rather than a specific nature does not mean that they should be accorded less weight or significance. *"A factor which applies to very*

[7] EA/2006/0011 and 0013 (at paragraph 82)
[8] EA/2006/0006 (at paragraphs 64-65)
[9] Per Wyn Williams J in *Department for Business Enterprise and Regulatory Reform v O'Brien and Information Commissioner ('DBERR')* [2009]EWHC 164 (QB)

many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so." (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner*[10]).

(vii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of freedom of information regimes and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture Media and Sport v Information Commissioner*[11]).

(viii) The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner*[12]).

(ix) Some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential (*Calland v Information Commissioner and FSA*[13]).

(x) The age of the legal advice contained in the information is relevant. The passage of time would, as a general principle, favour disclosure. Legal advice is, however, still "live" if it is still being implemented or relied upon as at the date of the request or may continue beyond that

[10] [2009] EWHC 1611 (Admin)
[11] EA/2007/0090 at paragraph 28
[12] EA/2006/0007 at paragraph 50
[13] EA/2007/0136

date to give rise to legal challenges by those unhappy with the course of action adopted.

The Public Interest Test: Factors in favour of maintaining the exemption

29. We accept the arguments that confidentiality is crucial to the effective working of the relationship between lawyer and client, whether the client is a private individual or a public authority. Disclosure of legal advice could lead to prejudice to public authorities in obtaining advice on their legal rights, obligations and liabilities. Regular or routine disclosure of such advice would prejudice the public authority from adopting a more favourable or an alternative position. Advice from solicitors or counsel is, of course, a professional opinion on a particular set of facts and circumstances and as such, professional opinions may differ.

30. The IPO concluded that given the substantial public interest in maintaining confidentiality of information protected by legal professional privilege, it is likely to be only in "exceptional circumstances" that this will be outweighed by the public interest in disclosure. We agree with the Commissioner that the "exceptional circumstances" test is incorrect and does not properly reflect the public interest balancing exercise.

31. Applying the approach identified by Wyn Williams J in *DBERR*, we accept that we must give significant weight to the *"in-built public interest in withholding information to which legal professional privilege applies"*, then ascertain whether, at the relevant time, there are particular or further factors in the instant case which point to non-disclosure, and then consider whether the features supporting disclosure are of equal weight at the very least.

32. In addition to that significant public interest in favour of protecting information covered by legal professional privilege generally, the Commissioner identified two factors specific to the instant case which weigh in favour of maintaining the exemption:

(i) the advice was "live", insofar as Mr. Szucs continues to advance a grievance about the way in which the IPO handled his complaint in 1989 such that the IPO may have cause to rely on that advice again;

(ii) the decision to which the legal advice relates has been affirmed three times. Accordingly, the public interest in ensuring good administration (which weighs in favour of disclosure) is comparatively weak as the lawfulness and propriety of the IPO's chosen course of action has already been tested.

33. Although the legal advice itself is now several years old, we are satisfied that it remains "live" because of the continuing action by Mr Szucs, his family and associates in respect of the long-running dispute with the IPO. We accept that the IPO may have cause to rely on the advice again in the future in light of this continued action.

34. Despite accepting that the IPO used the legal advice correctly, Mrs Szucs suggests that the IPO did not necessarily follow legal advice it was given but rather chose one of a number of options that were presented to it. She submits that *"it seems unlikely that the legal advice gave the use of section 32(2)(a) as the only course of action to take"* and *"it is most unlikely that the advice did not give option for disclosure"* [sic]

35. This is pure speculation. It is accepted that the decision of the IPO to withhold the patent agent's letter on the basis of the exemption on section 32(2)(a) of FOIA has been upheld by the Commissioner, this Tribunal and the High Court. We agree with the Commissioner that the lawfulness and propriety of the IPO's chosen course of action has been tested repeatedly. We have seen the disputed information and echo the Commissioner in saying that, while we cannot reveal its contents, it does not *"raise concerns that the public authority may have misrepresented the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice that it has obtained."*

The Public Interest Test: Factors in favour of disclosure

42. The following factors have been identified by Mrs Szucs and which she submits the Commissioner failed to consider that would have tipped the balance of the public interest test in favour of disclosure :

(i) The public interest in transparency and reasons for decision of the public authority;

(ii) That there is assurance of the integrity of the IPO;

(iii) That the legal advice of 23 March 2005 has been presented to the High Court as providing compelling reasons for not disclosing the patent agent's statement;

(iv) That the information relates to a complaint that had been made asking for action in light of the lack of records of any thorough investigations in respect of matters in dispute (i.e. that the IPO had failed to discharge its duties properly in dealing with the 1989 complaint);

(v) That the legal advice had been obtained on the basis of insufficient briefing by the client;

(vi) The use of resources in the conduct of the requests for information was significantly more that the alternative action for review *"for genuineness of RPAR"*;

(vii) That it is questionable whether the legal advice of 23 March 2005 is competent.

43. We agree that the public interest on transparency and accountability of public decision-making is a factor weighing in favour of disclosure in this case, and that the fact that public funds had been spent on the legal advice adds weight to the public interest arguments based on transparency.

44. Mrs Szucs submits that the integrity of the IPO is of great importance in general, and to patentees and inventors in particular, therefore it is in the public interest that there is assurance of that integrity. She attacks the propriety of the IPO's decision to rely on section 32(2)(a) of FOIA to withhold the patent agent's letter and on that basis calls into question the integrity and competence of the legal advice underlying that decision.

45. While we accept that there is clear public interest in knowing whether a public authority acted in accordance with or contrary to legal advice, we do not consider that the "integrity" of the IPO would be enhanced or reduced by disclosure of this legal advice and its associated documents.

46. It is not within our jurisdiction to decide whether the advice was correct or not but, if the information protected by legal professional privilege showed any evidence of malfeasance or negligence or suggestion that the IPO had acted contrary to the legal advice given, then there would be a very strong public interest argument in favour of disclosure. Having examined the disputed information we can state that this is not the position in the instant case. This is supported by the fact that the decision of the IPO to withhold the document from the patent agent under section 32(2)(a) of FOIA was upheld by the Commissioner, the Tribunal and the High Court. On the same basis, we do not consider that the fact the disputed information was relied upon in the High Court in support of withholding the patent agent's statement is a factor in favour of disclosure. Even if it were, the fact that the advice has been accepted as correct would mean that little, if any, weight could attach.

47. Although Mrs Szucs denies that this Appeal is concerned with the original dispute with the IPO or seeks to reopen the earlier requests for information under FOIA, she does suggest that as the disputed information relates to a

complaint that has been made asking for action in light of the lack of records of *"any thorough investigations in respect of matters in dispute"*, this is an additional factor in favour of disclosure which the Commissioner should have taken into account. She submits that *"the release of the requested document would give the answer whether the UKIPO was prohibited to use the alternative dispute resolution or not."*

48. As far as we are able to understand Mrs Szucs's submissions on this point, she appears to be arguing that the disputed information covered legal advice in respect of whether the IPO could enter into ADR with Mr. Szucs over the patent applications. This Appeal concerns the legal advice sought in respect of whether the patent agent's letter could be disclosed under FOIA; it does not deal with matters such as ADR. These submissions are therefore incorrect and this does not amount to a factor in favour of disclosure.

49. The fifth factor in favour of disclosure identified by Mrs Szucs is that the legal advice had been obtained on the basis of insufficient briefing. She also suggests in her written submissions that, *"There is public interest to know whether the RPAR inquiry was genuine."* Mrs Szucs's submits that the RPAR inquiry in 1990 was not genuine and this was a matter of which the legal adviser should have been made aware. The question of whether the RPAR inquiry in 1990 was genuine or not is not a matter within the jurisdiction of this Tribunal; the inquiry was held and its decision stands. We must proceed with this Appeal on that basis. We do not consider therefore that this is a factor in favour of disclosure.

50. Mrs Szucs submits that the use of resources by the IPO in refusing the requests for information under FOIA, by her husband the other individual and herself, was significantly more than "*the alternative action for review of genuineness of RPAR"*. She argues that refusing disclosure was *"costlier and less appropriate than the alternative of reviewing the RPAR procedures of 1990. That would have been a routine and inexpensive task for IPO staff. One may wonder if the action was not taken to allow continued suppression of uncomfortable information."* There is no evidence before us of the costs involved in either the

IPO refusing the requests for information under FOIA or for the *"alternative action"* envisaged, but not specified, by Mrs Szucs.

51. We accept that there is a public interest in how public funds are spent by a public authority. However, in this case, we consider that the IPO was right to have sought legal advice on whether the letter of the patent agent could be disclosed under FOIA in 2005. The legislation was relatively new, and the interests of Mr Szucs, the patent agent and the wider public had to be considered. We consider that criticism could have been made of the IPO if it had not sought legal advice in circumstances where it had indicated an intention that it "*would wish to be able to give Mr Szucs all the documentation in our possession*" and where the patent agent had refused to consent to the disclosure of his letter. We give no weight to this as a factor in favour of disclosure.

52. The final factor identified by Mrs Szucs in favour of disclosure is said to be that it is questionable whether the legal advice was competent. In her Grounds of Appeal Mrs Szucs submits that the legal advice referred to a document which was personal information of the requestor and therefore should have been handled as a Subject Access Request under section 7 of the Data Protection Act 1998. This is factually incorrect; there is no reference to Mrs Szucs in the disputed information. In any event, we have noted above that the quality or correctness of the legal advice is not a matter for this Tribunal to assess when considering the public interest factors; a factor in favour of disclosure would be, for example, that a public authority has misrepresented the advice it has received. This is not the case here. We therefore reject this as a factor in favour of disclosure.

53. A further factor in favour of disclosure can be the numbers of people affected by the decision of the public authority in following the legal advice. The numbers of people affected was a factor supporting the public interest in disclosure raised by the Tribunal in *Mersey Tunnel Users Association v Information*

Commissioner[14] *('Mersey Tunnel').* In that case those affected were tunnel users, who were obliged to pay the toll for using the tunnel, and the generality of council tax payers who had financed tunnel losses. Those affected were obliged to pay tolls or council tax at the levels set, and the legal advice that was the subject of the application had a direct bearing on the setting of tolls and tax. By contrast the legal advice of the IPO concerned one request for information in the context of a long-running dispute with one individual. The Commissioner properly considered that the disputed information legitimately concerns Mr. Szucs, his family and other individuals who may have concerns about how the IPO operates. This means that the numbers involved is not a factor that could weigh as heavily as they did in *Mersey Tunnel.* While we accept the frustrations of Mr and Mrs Szucs about the process and the decision in 1990, and their interest in challenging that process and decision, and in finding out as much information about the process as possible, this does not amount to a public interest factor in favour of disclosure.

The Public Interest Test: Where does the balance lie?

54. In making section 42(1) of FOIA a qualified exemption, we accept that Parliament considered that disclosure of information protected by legal professional privilege would only be withheld from disclosure if the public interest balance lies in favour of maintaining the exemption. Having examined each in turn, we do not consider that the factors favouring disclosure carry great weight when applied to the disputed information in the instant case. The disclosure of the disputed information is not necessary for the public to obtain information about the IPO. The fact the legal advice the IPO received in relation to the request for information made by Mr Szucs in 2005 may be of interest to Mrs Szucs, her husband, their associates and perhaps a slighter wider section of the public, but it does not follow that its disclosure is in the public interest. Curiosity as to the legal advice a public authority has received, or the fact that its disclosure may enable the public to better understand the legal argument relevant to the issue concerned, are "weak" factors in favour of disclosure; this is

[14] EA/2007/0052

particularly true in the instant case where the advice was “live” and therefore potentially relevant to future legal proceedings involving the IPO.

55. There is a presumption in favour of disclosure: information falling within section 42(1) of FOIA must be disclosed unless in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore, even though we consider that the factors favouring disclosure do not carry significant weight in this case, the information must be disclosed unless we consider that the factors in favour of maintaining the exemption are greater.

56. In assessing the factors in favour of maintaining the exemption, we gave significant weight to the in-built public interest in withholding information to which legal professional privilege applies, however, we consider that added to that, the other factors identified, in particular that the legal advice was “live” at the relevant time, carry significant weight themselves.

57. We consider that this is an overwhelming case in favour of maintaining the exemption and agree with the Commissioner that the public interest factors in favour of disclosure do not come close to being equally strong countervailing factors that would outweigh the public interest in maintaining the exemption in the circumstances of this case.

58. We therefore conclude that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

Conclusion and remedy

59. For the reasons given above we find that the exemption in section 42(1) of FOIA is engaged and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

60. The Tribunal therefore dismisses this Appeal. The IPO was entitled to refuse to provide the disputed information on the basis it was exempt under section 42(1) of FOIA.

61. Our decision is unanimous.

Signed

Annabel Pilling

Tribunal Judge

Dated 16 August 2011