FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA/2013/0081
Appellant:	DHSSPS
Respondent:	The Information Commissioner
Second Respondent:	M McDermott
Third Respondent:	The Attorney General for Northern Ireland
Judge:	NJ Warren
Member:	D Stephenson
Member:	D Sivers
Hearing Date:	29 October 2013
Decision Date:	13 November 2013

DECISION NOTICE

A. Background

1. In 1985 the United Kingdom (UK) introduced a ban on blood donation by men who have had, at some time in their lives, sex with another man. On 8 September 2011 following an expert review it was announced that in England, Scotland and Wales the ban would be modified with effect from 7 November 2011. It would no longer apply to men who had not had sex with men in the previous year. The minister at the Department of Health and Social Security and Public Safety (DHSSPS) Mr Poots, decided to maintain the status quo in Northern Ireland.

2. This led to the threat of judicial review and DHSSPS received pre-action protocol letters dated 27 September 2011 and 1 November 2011. In October 2011 DHSSPS received advice from the Attorney General for Northern Ireland ("the Attorney General") about the matter. On 26 October 2011 there was a session of the

Committee for Health Social Services and Public Safety of the Northern Ireland Assembly which received evidence from interested parties including Mr Poots. In November 2011 someone to be known in accordance with a High Court order for anonymity as JR65 applied to that Court for permission to bring an action for judicial review.

3. A couple of months later, on 8 February 2012, Mr McDermott from the Rainbow Project, who had been amongst those giving evidence to the Assembly committee, sent a request for information under the Freedom of Information Act (FOIA) to DHSSPS. We are concerned only with the part of that request which asks for:-

> " … a copy of the advice received by the Minister for Health, Social Services and Public Safety from the Attorney General for Northern Ireland in respect of the lifetime ban on men who have sex with men from donating blood in Northern Ireland."

4. The Department refused the request and on 5 May 2012 Mr McDermott complained to the Information Commissioner (ICO). In June 2012 permission for the judicial review action was granted. On 25 March 2013 the ICO issued a decision notice requiring DHSSPS to disclose the withheld information. There is now before us an appeal by DHSSPS against that decision notice. The High Court decision on the judicial review application was delivered on 11 October 2013. Treacy J held that it was open to Mr Poots to regard the risks to be so high that a lifetime ban remained appropriate. On the other hand, it was irrational for Mr Poots to, at the same time, permit imports of blood from the rest of the UK. In any event, the High Court concluded that the power to make a decision on this issue lay with the Secretary of State in London. If the decision had lain with DHSSPS then the Minister would have been bound first to refer the issue to the Executive Committee.

B. The hearing

5. We heard this appeal at Belfast on 29 October. DHSSPS were represented by Mr Sharpe. The ICO was represented by Mr Hopkins. Mr McDermott was represented by Mr McQuitty. The Attorney General, who had been joined as a

party was represented by Mr Wimpress who also placed before us a written submission from Mr Huckle QC who is Counsel General to the Welsh Government. We express our thanks to all of these for their written submissions and, to those who appeared, for their oral argument.

6. The Tribunal registrar had authorised a closed bundle to be prepared for the hearing consisting of the disputed information and a confidential annex to the ICO decision notice. We needed to see the disputed information in order to reach a fair decision. To disclose it beforehand would defeat the purpose of the proceedings. We had to see the confidential annex because we were hearing an appeal against the whole of the ICO decision notice. We were satisfied that the annex described the advice and discussed arguments so intricately involved with the advice that to reveal the annex would also defeat the object of the proceedings.

7. At the start of the hearing, Mr McQuitty proposed that the closed bundle be disclosed to himself on his undertaking to treat it as confidential. We refused the application because we were satisfied that we could properly carry out our task without disclosing the material to Mr McQuitty. See Browning v ICO and DBIS (2013) UKUT 236 (AAC).

8. To assist us in this, we received a list of issues or questions from Mr McQuitty. It was also relevant that this was a case in which the ICO had seen the closed material; would be present at any closed part of the hearing; and would be arguing for the same result as MrMcQuitty.

9. Towards the end of the hearing the three other advocates invited us to hold a short closed hearing and we did so. When it concluded we explained in open court what had happened. We had been through the questions that Mr McQuitty had left for us. Of these , numbers 4 and 5 could not be answered because they referred to the DHSSPS request for advice, which had not been requested and we had not seen. We had listened to submissions which pointed to elements of the closed material as examples of arguments which had already been aired in open session. We had also been asked by the ICO to consider the extent to which the advice was firm.

10. DHSSPS and the Attorney General both submit that the requested information is exempt from disclosure under FOIA. They point to three categories of exempt information in the Act:-

    (a) Section 35(1)(a) which deals with the formulation or development of government policy.

    (b) Section 35(1)(c) which deals with the provision of advice by the Attorney General or any request for the provision of such advice.

    (c) Section 42 which deals with information in respect of which a claim to legal professional privilege (LPP) could be maintained.

11. These exemptions are not absolute exemptions. They apply if or to the extent that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the exemption". This is often referred to as the public interest balancing exercise. Something should be said about the manner in which the ICO asks us to carry this out.

12. In short he asks us to carry out three balancing exercises, not one. In his own decision notice, he takes first the LPP exemption (paras 12-27) and concludes that whilst the judgement is a finely balanced one, the public interest in maintaining the LPP exemption does not outweigh the public interest in disclosure. There follows (paras 28-48) a discussion of the exemption relating to formulation and development of government policy which leads to a separate conclusion in favour of disclosure in which the public interest factors are again described as "finely balanced". In his response to the appeal, the ICO states that "there is no determination" in the decision notice in respect of the Attorney General exemption because he asked DHSSPS what part of Section 35 was relied upon and was told "Section 35(1)(a)".

13. It will be seen that the effect of this piecemeal operation is that at no stage when carrying out the balancing exercise did the ICO consider "all the circumstances of the case" as required by Section 2(2)(b) FOIA.

14. This point was not taken in any of the written submissions. Mr Hopkins submitted that if this became an issue time should be granted for further written argument. As it happens, our reasoning in this case does not require us to rule on this point; had it done so, then we agree that fairness would have required us to give time for further submissions.

15. We would add only this. The ICO accepts that disclosure under the Environmental Information Regulations (EIR) requires a single balancing exercise. It would seem to follow that, on the ICO's interpretation, there will be a large number of cases in which public authorities, the ICO and the Tribunal will be required to make a sometimes difficult decision about which disclosure regime applies in order to find out how to conduct the public interest balancing exercise.

C. The LPP Exemption

16. We readily accept that there is a public interest in favour of disclosure of the disputed information. Some of it can be described in the usual way by referring to the value of accountability, transparency and public understanding for the reasoning behind official decisions. It is better, however, to put some flesh on the bones. The decision to opt out of the relaxation of the ban was important and controversial. We would not ourselves attach much weight to the effect of disclosure on the total amount of blood available; but we would stress the importance of Mr McDermott's legitimate public interest in ensuring that those whom the Rainbow Project represents are able to participate in society as the ordinary citizens that they are. It follows that it is proper for him to be concerned that any restriction in the matter of something like blood donation is properly supported by expert opinion.

17. The ICO refers also to the failure to consult the executive committee; the disparity with England, Scotland and Wales; and questions of EU law. We regard these as all part of the controversial nature of the decision.

18. That said, it is important not to overestimate the role which disclosure of the disputed information might play in public debate. The Attorney General's advice was sought after the decision was taken. It can therefore give no guide as to the

Minister's motives or reasoning. Moreover, much more important to the public debate is material already publicly available in the expert reports; the scientific information on which they are based and the Hansard account of the Assembly Committee's investigation.

19. Another factor to be taken into account in assessing the public interest in disclosure is that when the request was made judicial review proceedings, in which the Attorney General represented DHSSPS, were already underway. It could reasonably be expected that before long, the Attorney General's mature consideration of the legal issues would be aired publicly in open court.

20. Having considered all the circumstances including the closed material it seems to us that the public interest in maintaining legal professional privilege outweighs the public interest in disclosing the Attorney General's advice.

21. The significant weight which must be attached to the public interest in preserving LPP is sufficient, in our judgement, to be decisive of this case. This factor has a general importance. See the cases summarised in DCLG v The Information Commissioner and WR (2012) UKUT 103 (AAC) especially at paragraphs 36-46.

22. We should perhaps make two further comments on our reasons for disagreeing with the ICO decision. Unlike the ICO we do not consider the public interest attaching in general to LPP to be weakened by his view that the judicial review proceedings would not be "undermined", whatever that might mean. Their existence at the time of the request seems to us to be an additional specific factor in favour of maintaining the exemption. It seems unfair that a public authority engaged in litigation should have a unilateral duty to disclose its legal advice.

23. It is not necessary to issue a closed decision to deal with the confidential annex. Suffice it to say that, with the exception of its final paragraph, the matters raised in the confidential annex have been included in our assessment. As to the final paragraph, Mr Hopkins accepted at the hearing that its conclusion was overoptimistic.

24. Our conclusion in respect of the LLP exemption, in which we have taken into account all the factors in favour of disclosure, is sufficient to allow the appeal. Had we gone on to consider the exemption under Section 35(1)(c), either separately or cumulatively, it seems inevitable that we would have found in favour of DHSSPS on this issue also, especially having regard to the weight which must be attached to the Law Officers' Convention. See the judgement of Blake J in HM Treasury v Information Commissioner and Owen (2009) EWHC 1811(Admin). It did not seem to us that section 36(1)(a) added materially to the decision.

25. Our decision is to set aside the ICO decision notice and, for the reasons we have given, to confirm that DHSSPS correctly refused the information request. The information requested is exempt from disclosure.

NJ Warren
Chamber President
Dated 13 November 2013