



Neutral Citation Number:

**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2013/0130**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50470385  
Dated: 4 June 2013**

**Appellant: James Spencer**

**Respondent: The Information Commissioner**

**[2nd Respondent:] Ministry of Defence**

**Heard at: Salisbury Magistrates Court**

**Date of Hearing: 15 January 2014**

**Before**

**Chris Hughes**

**Judge**

**and**

**Jacqueline Blake and John Randall**

**Tribunal Members**

**Date of Decision: 21 January 2014**

**Attendances:**

For the Appellant: did not attend

For the Respondent: did not attend

For the 2<sup>nd</sup> Respondent: Robin Hopkins (Counsel) Madeleine Grundy (Solicitor)

Subject matter:

Freedom of Information Act 2000

**Cases:**

DBERR v O'Brien [2009] EWHC 164 (QB), 2011 1 Info LR 1087

Office v Information Commissioner and Gavin Aitchison (GIA 4281 2012)

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 4 June 2013 and dismisses the appeal.

Dated this 21st day of January 2014

Judge Chris Hughes

[Signed on original]

## **REASONS FOR DECISION**

### Procedural issue – the decision to proceed with the hearing

1. There have been a significant number of procedural directions (Case Management Notes) given in these proceedings. On 3 July 2013 the Registrar gave a direction that Mr Spencer explain why voluminous documentation he had submitted in support of his notice of appeal was needed in order to enable his appeal to be fairly decided. On 25 July having considered his response to this Note the Registrar concluded that this documentation be returned to him on the grounds that it would be disproportionate to the actual issue in the case and Mr Spencer had not persuaded her that the documentation was relevant to the issue in the appeal.
2. Mr Spencer indicated that he wished to have an oral hearing and, in the light of this, on 22 October 2013 the Registrar gave directions for that hearing including for the preparation of the bundles and setting out the Tribunal's understanding of the scope of the hearing:- the application of legal professional privilege and, if it applied, the balance of public interest. Mr Spencer argued that there should be a stand-alone issue relating to his allegation of fraud against the Second Defendant. On 29 October 2013 the Registrar confirmed to him she would not vary the Case Management Note since his arguments went to why in his view legal professional privilege should not apply.
3. In November Mr Spencer attempted to have a large volume of documentation added to the bundle prepared by the Commissioner. Mr Spencer appealed against a decision of the Registrar not to accept the additional documentation - this application to the Tribunal President was unsuccessful. He sought permission to appeal to the Upper Tribunal and this was refused by the Chamber President, on 31 December, since his appeal disclosed no arguable point of law.
4. On 12 January Mr Spencer indicated his intention of appealing to the Upper Tribunal on the procedural issue concerning the composition of the bundle, indicating that he wished the hearing date of 15 January to be vacated and confirming that if it was not he would not attend the hearing. In response he was notified that the hearing would not be adjourned.

5. In the light of the non-attendance of Mr Spencer the Tribunal considered whether to proceed in his absence. The Tribunal noted that Mr Spencer was aware of the hearing date and had decided not to attend. The issue of whether the additional material was included in the bundle had been decided in July by the Registrar and her reasons had been clear; as he was aggrieved by the decision Mr Spencer should have appealed then. The issue before the Tribunal was the application of the s42 legal professional privilege exemption and the Registrar, having considered the material and the notice of appeal, had concluded that it was not necessary or proportionate to include the material in the bundle for the Tribunal. The material the Tribunal needed to consider the case was before the Tribunal. In considering whether it was in the interests of justice to proceed with the hearing the Tribunal took into account the over-riding objective and in particular the need to deal with the case proportionately and avoiding undue delay. The Tribunal concluded that Mr Spencer's case was very fully set out and a proper consideration of the issues and a fair consideration of his case was possible even though he had chosen to absent himself. Any adjournment would add to the expense of the parties and cause delay. The Tribunal concluded that it was in the interests of justice to proceed.

#### Introduction

6. There has been conflict between Mr Spencer and the Ministry of Defence for many years. It appears to have arisen out of a Landlord and Tenant dispute between the Ministry and Mr Spencer's father and uncle (who are agricultural tenants on Salisbury Plain) in respect of which legal proceedings started with a referral to arbitration in 1999. Despite the length of time which has elapsed and the several stages through which it has been, the dispute remains live and directions are awaited for the next stage of arbitration proceedings.

#### The request for information

7. By an email dated 10 April 2012 (O/B 65) the Mr Spencer requested:-

*“Copies of any records of communications in whatever format between 1 October 2005 and 1 December 2005 by Defence Estates (now the Defence Infrastructure Organisation), or any of its agents and Landmarc Support Services and/or Smiths-Gore Chartered Surveyors and/or SGDN Ltd concerning the Case D Notice to Quit Arbitration against (names redacted)” ('first request').*

On 22 May 2012, he made a supplementary request for:-

*“a copy of the letter which indicates at some point in 1999 that Wilsons (firm of solicitors) gave advice to Humberts (land agents) whilst acting as agents for Defence Estates” (‘the second request’) (‘O/B 68’).*

8. The MOD provided certain information in response to the first request and advised that other information in respect of both requests was withheld under section 42(1).
9. Mr Spencer complained to the Commissioner who on 4 June 2013 concluded that the MOD had correctly withheld the requested information in both requests under section 42(1).

#### The appeal to the Tribunal

10. Mr Spencer appealed against this determination on 10 June 2013. He argued that the Commissioner was wrong in determining that the public interest was in not disclosing the letters and made a number of points:-

- the Ministry of Defence was being oppressive in its conduct of the litigation, and should act with a higher standard than the private sector
- the Spencers had been subject to alleged criminal harassment which he ascribed to the Ministry,
- he made very detailed and lengthy allegations of corruption in the Ministry of Defence.
- he alleged fraud and misconduct by the Ministry of Defence and its representatives in the course of the Landlord and Tenant dispute
- He disputed that the advice from 1999 related to the dispute,
- He alleged misconduct by solicitors and surveyors and that the Ministry had abused their power by interfering with the contract between the Spencers and their former surveyors.

11. The Commissioner disputed the appeal and maintained the stance taken in his decision notice. The withheld communications were what was normal in such a dispute and did not raise questions of public interest. The Ministry supported the

Commissioner and confirmed that it had not waived privilege with respect to any of the disputed information.

#### The questions for the Tribunal

12. The issues before the Tribunal may be very simply stated – was the Commissioner correct in concluding that the communications were protected from disclosure by reason of s.42FOIA, legal professional privilege. If so, in all the circumstances of the case, was disclosure in the public interest.

#### Evidence

13. The disputed material consists of two letters and seven e-mails, the dates of which, and the names of the senders and recipients have been disclosed to Mr Spencer. All the documents address issues arising in the dispute and the resultant litigation. They clearly attract legal professional privilege.
14. Mr Norris, a civil servant who worked in land management as Estate Surveyor on Salisbury Plain between 2004 and 2013, gave evidence on behalf of the Ministry. He confirmed the protracted history (largely relating to the level of rent payable from 1999 onwards). A formal arbitration started in 1999 and was followed by County Court proceedings which were determined in the Ministry's favour on appeal to the Chancery Division in 2012. Outstanding points of challenge to the validity of a notice to quit served in 2004 have been referred to a second arbitrator. The Tribunal accepted the evidence of Mr Norris that the legally privileged information whose disclosure was sought remained live and its disclosure could prejudice the Ministry in the arbitration. Mr Norris denied all allegations of misconduct made by Mr Spencer.

#### Analysis

15. The Tribunal was satisfied from an examination of the disputed material and the evidence of Mr Norris that legal professional privilege attached to the documents and that their disclosure would cause some disadvantage to the Ministry in the litigation. The information contained in the documents was all closely tied to the minutiae of the issues in dispute.

16. The Tribunal considered the wide-ranging allegations made by Mr Spencer in seeking to establish a public interest in disclosure and in seeking to strike down the claim of privilege on the basis of fraud and criminality. The Tribunal considered that, even if the allegations were accepted, they had no relation to the content of the disputed material – the allegations did not illuminate the material, the material provided no evidence for the allegations. The disputed material did not speak to the alleged misconduct, and accordingly any such misconduct could not act so as to defeat legal professional privilege.
17. The disputed material relates to a dispute between a landlord and a tenant. The public interest in the case is that it be adjudicated and resolved according to law. Setting aside the confidentiality which arises from legal professional privilege would disadvantage one of the parties to litigation which remains live and, as such, is not in the public interest.
18. There is an inherent public interest in the maintenance of legal professional privilege in ensuring the rule of law. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees. We accept the submissions of Mr Hopkins that it is well established that where section 42(1) FOIA is engaged, it carries strong in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. Our attention was drawn to the leading case of DBERR v O'Brien [2009] EWHC 164 (QB), 2011 1 Info LR 1087 and also to Cabinet Office v Information Commissioner and Gavin Aitchison (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said that *“it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it”*.
19. There is no argument of substance advanced by Mr Spencer which justifies disclosure. His interest is purely private and relates to the litigation in which members of his family are engaged against the Ministry of Defence. No public interest has been identified which even begins to reach the threshold for disclosure set by the authorities cited above.



20. At the conclusion of his statement of appeal, where he sought to imply misconduct by a firm of solicitors, Mr Spencer stated:- “*We would be happy to enlarge upon this matter, but as it does involve the release of our confidential papers we will firstly require the acceptance of all parties that in so doing we do not waive our rights to Litigation Privilege and Client-lawyer Advice*”. Neither should such loss of these rights be expected of the Ministry.

Conclusion

21. The Tribunal upholds the decision notice dated 4<sup>th</sup> June 2013 and dismisses the appeal. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 21 January 2014