



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

**Appeal No: EA/2013/0215**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50486278**  
**Dated: 16 September 2013**

**Appellant: Richard Palmer**  
**Respondent: The Information Commissioner**  
**2nd Respondent: Her Majesty's Revenue and Customs**  
**Heard at: Ashford Tribunal Centre**  
**Date of Hearing: 24 January 2014**

**Before**  
**Chris Hughes**  
**Judge**

and

**Mike Jones and Narendra Makanji**  
**Tribunal Members**

**Date of Decision: 31 January 2014**

**Attendances:**

For the Appellant: in person

For the Respondent: no attendance

For the 2<sup>nd</sup> Respondent: Ms Christina Michalos, Counsel (Edmund Yeo, Solicitor)

**Subject matter:**

Freedom of Information Act 2000

**Cases:**

DBERR v O'Brien and another [2011] 1 Info LR 1087 [2009] EWHC 164

St John's College School Cambridge v Secretary of State for Social Security [2000]  
EWHC J0612-5

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 16 September 2013 and dismisses the appeal.

Dated this 31st day of January 2014

Judge Hughes

[Signed on original]

## **REASONS FOR DECISION**

### **Introduction**

1. The Categorisation of Workers Regulations 1978 are social security regulations introduced to clarify the position of certain workers and define the type of national insurance contributions they should pay in order to receive various national insurance benefits. In particular they made provision for treating lectures, teachers, instructors and those in a similar capacity who were not employed under an employment contract as employees for national insurance purposes. In 2000 the High Court in *St John's College School Cambridge v Secretary of State for Social Security [2000] EWHC J0612-5* considered the Regulations and the correct classification of visiting instrumental teachers. In giving his judgement Mr Justice Munby (as he then was) observed that the definition of “*educational establishment*” in the Regulations was non-exhaustive and needed to be given its ordinary and natural meaning and not a narrow one and that the “place where instruction is provided” did not even need to be a building.
2. As a result of this, over the following years, guidance was issued both internally within HMRC and externally to explain how HMRC would apply the Regulations in the light of the judgement. The guidance was criticised as hard to apply and Mr Palmer was involved over some years, in conjunction with other individuals and organisations providing first aid training, in meetings and correspondence with HMRC trying to resolve the issues.
3. With effect from 6 April 2012 the relevant provisions were revoked so far as they applied to lecturers, teachers, instructors and those in a similar capacity.

### **The request for information**

4. On 12 December 2012 Mr Palmer wrote to HMRC and asked for:-  
  
*“1. Copies of legal advice taken/received by HMRC in relation to the Categorisation of Earning Regulations 1978 in relation to its application in regards to Teacher, Trainer, Instructors or type of course etc since 2000-2012.*

*2. Dates of all legal advice on the Categorisation of Earning Regulations 1978 was taken and received that related to teachers, trainers etc or type of course etc.”*

5. The HMRC, on 14 January 2013 (and confirmed on review on 12 February) stated that such material was held but declined to provide it on the basis of s 42(1) FOIA – legal professional privilege and that the balance of public interest favoured maintaining the exemption.

The consideration by the Information Commissioner

6. Mr Palmer complained to the Commissioner. He reviewed the withheld information (DN para13-14) and concluded:-

*“Both the emails and attachments identified by HMRC as being within the scope of the request contain information provided by a professional legal adviser to their client for the dominant purpose of obtaining legal advice.”*

7. The Commissioner considered Mr Palmer’s arguments in favour of disclosure:-
- There was media interest in tax and tax avoidance
  - He argued that HMRC had misled some groups by making them account for National Insurance when they were not required to and HMRC had ignored legal advice and made policy decisions on interpretation of the Regulations to the detriment of individuals – there was a public interest in disclosing the advice
  - Since the partial revocation of the Regulations legal advice on the issue was less sensitive and disclosure would reassure the public that HMRC had acted appropriately.
8. The Commissioner noted the strong public interest in maintaining legal professional privilege and the risks arising from weakening that. He acknowledged that the disclosing of advice would weaken the HMRC’s position in any litigation and that although there was a general bar of two years for claiming refunds that was not an absolute bar and HMRC had very recently received a request for a refund and further requests remained a possibility. The advice was therefore still live. HMRC had carried out two public consultations to *“seek views on how the Regulations should be amended in order to clarify those to whom it is intended to apply”* it had consulted

on impact and evidence-base before revoking the Regulations including consulting those likely to be affected by change. In the consultation it had acknowledged criticism of its guidance. The Commissioner reviewed the material and concluded that disclosure would not uncover wrongdoing or deliberate disregard of previous advice. Although 60,000 people involved in training completed self-assessment records the number of individuals likely to be still entitled to make applications for refunds and who would be interested in understanding the decision-making process would be far smaller.

9. In weighing the public interest the Commissioner concluded that, although it was finely balanced, the interest in maintaining legal professional privilege outweighed the interest in disclosure.

#### The appeal to the Tribunal

10. In his appeal Mr Palmer argued as to issues concerning the Regulations and their interpretation and claimed that the Commissioner had placed undue weight on HMRC's arguments as to public interest. He repeatedly claimed HMRC either "*totally ignored legal advice or the advice was wrong and faulty*". He claimed that since 2009 HMRC had misled "*people, MPs, the Parliamentary Ombudsman and Ministers*" and that there was a strong public interest in disclosure.
11. The Commissioner noted that Mr Palmer was not disputing that legal privilege applied and maintained his stance as set out in the decision notice on the balance of public interest. With respect to the suggestion that HMRC policy officials had overreached themselves he repeated a clarification HMRC had given to Mr Palmer in 2008 explaining how HMRC's processes worked in giving guidance on legislation and rulings where there was still some ambiguity and that "*it was a legitimate function of HMRC to interpret the Courts' rulings in the context of the policy intention of the legislation as set down by Ministers*".
12. He confirmed he had seen no evidence of wrongdoing and that the advice remained "live". HMRC supported this analysis.

The questions for the Tribunal

13. The issue for the Tribunal was that, given that legal professional privilege applied, in the circumstances at the time of the request was the advice live and how should the balance of public interest be struck.

Submissions and Evidence

14. In his submissions Mr Palmer emphasised the confusion which had been caused by HMRC's handling of the issue and the importance of taxation being based on law and being certain. HMRC had introduced terms not present in the Regulations such as "traditional" in connection with the definition of educational establishment, and "substantial achievement" in connection with whether a qualification resulted from training, which were not mentioned in the Regulations as originally drafted. HMRC had caused confusion and officials had acted beyond their remit; they had acted as judges and lawmakers and ignored Parliament's intentions with regard to the Regulations. He argued that it was impossible for competent legal advice to have supported the interpretations placed on the Regulations by HMRC.
15. Mr Wythes a long-serving official who had been responsible for this area gave evidence on behalf of HMRC. The Regulations had only once been before the Courts and until 2000 HMRC had treated them as applying to academic and not to vocational courses. Following the St John's case queries arose and in 2003 HMRC concluded that the Regulations had a broader applicability than had been previously understood. He explored the complex ramifications of the impact of the Regulations – not simply with respect to levels of contribution but also future entitlement.
16. He acknowledged that HMRC had made errors in dealing with the first aid training sector:-*"The confusion within the sector, which HMRC accepts was wholly of HMRC's making, was primarily because of the mismatch between what published guidance mistakenly said and the Department's prevailing interpretation."* Following consultations HMRC concluded late in 2011 that the Regulations never applied to vocational education and on 17 October 2012 issued a public statement inviting applications for refunds of National Insurance Contributions paid in error by vocational trainers. Such refunds are subject to statutory time limits. Mr Wythes stated that HMRC had publicly acknowledged its errors, consulted widely, offered

refunds and acted in an open and transparent manner. Applications for refunds had been made as late as 18 December 2013 and the HMRC was in dispute with one major taxpayer on this issue which involved a substantial amount of money and could still proceed to litigation. He confirmed the importance to Government of effective access to legal advice and the iterative nature of the process between policy officials and legal advisers which would be threatened by disclosure. Counsel for HMRC drew the Tribunals attention to the findings of the Parliamentary Ombudsman arising from the investigation of Mr Palmer's complaint and HMRC's letter to the Ombudsman. The Ombudsman found "*HMRC fully explained and acknowledged those errors in their letter to us....Given that full explanation and acknowledgement.....*"

### Analysis

17. In *DBERR v O'Brien and another [2011] 1 Info LR 1087 [2009] EWHC 164* the High Court in mapping out a three phase process for considering qualified exemptions under FOIA such as legal privilege (identifying public interest issues in favour of disclosure, those in favour of maintaining the exemption and then weighing the considerations) noted that "*The inbuilt public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight*".
18. The Tribunal was struck by the absence of significant factors weighing heavily in favour of disclosure: - consideration of the withheld material does not disclose any impropriety such as Mr Palmer has alleged or even incompetence or negligence – rather it shows policy officials and lawyers worrying away at a somewhat intractable problem.
19. HMRC has been transparent in its apology and consultations and has publicised the entitlement to reclaim incorrectly paid contributions. The number of people likely to be interested in the disclosure is small, it would marginally increase transparency by revealing a small aspect of the working out of one of the many challenges which Government deals with on a day to day basis and which, as a policy matter, is of marginal interest to the public at large.
20. On the other side it is clear that the advice remains live, claims continue to be made and there is a distinct possibility of litigation. A very significant issue is the harm that this disclosure would do to the effective working of the machinery of government by

inhibiting effective exchange of legal advice and insights into issues which are key to the effective working of HMRC and other institutions. Furthermore considerable weight must be given to the maintenance of the rule of law and the key role legal professional privilege plays in upholding that and the individual's rights which flow from it. Care must be taken to avoid weakening the public confidence that exists that legal advice will be protected from disclosure.

21. The Tribunal is satisfied that the correct conclusion was reached by the Commissioner, that the material should not be disclosed. Indeed unlike the Commissioner the Tribunal considers that this was not a finely balanced decision – on the contrary the Tribunal's view was that the weight of public interest is very strongly in favour of maintaining the exemption.

Conclusion and remedy

22. The Tribunal therefore concludes that the decision of the Commissioner was correct in law.
23. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 31 January 2014