



Tribunals Service
Information Tribunal

Appeal Number: EA/2007/0016

Freedom of Information Act 2000 (FOIA)

Heard on papers at Procession House, London
On 17 July 2007

Decision Promulgated
6 August 2007

BEFORE

INFORMATION TRIBUNAL CHAIRMAN

John Angel

And

LAY MEMBERS

Jaqueline Clarke and Roger Creedon

Between

**THE MINISTRY OF JUSTICE (previously the DEPARTMENT FOR CONSTITUTIONAL
AFFAIRS)**

Appellant

And

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Philip Sales QC and Deok Joo Rhee

For the Respondent: Timothy Pitt-Payne

Decision

The Tribunal upholds the appeal and finds that the Appellant does not have to comply with the Information Notice dated 29 January 2007 served on it by the Respondent.

Reasons for Decision

The request for information

1. By email dated 5 January 2005 Frances Gibb (Ms Gibb) of The Times asked the Department for Constitutional Affairs (DCA) (now part of the Ministry for Justice) for disclosure of several pieces of information under FOIA including:

The Attorney General's advice over the "public interest" test and its interpretation under the Freedom of Information Act.

2. The DCA is now part of the Ministry of Justice but for the purposes of this appeal we will continue to refer to the department as the DCA.
3. The DCA responded to the request by letter dated 1 February 2005 by refusing to confirm or deny whether it held such advice by the Attorney General (the refusal notice). The letter set out the reasons for the refusal where the DCA applied the s.35(1)(c) FOIA qualified exemption, namely information held by a government department relating to "the provision of advice by any of the Law Officers or any request for the provision of such advice".
4. Ms Gibb asked for an internal review of the decision by email on 8 February 2005 further explaining the nature of her request.

His 'advice' in this case is central to the entire operation of the Act and informs how it will work. It is not advice in the traditional sense of legal advice to a client; but rather the very basis of the policy underpinning a piece of legislation whose whole aim is to make information to the public. How this is to work is clearly a matter of public interest.

5. By letter dated 8 April 2005 to Ms Gibb following an internal review the DCA upheld its original decision to refuse the request.

Complaint to the Information Commissioner

6. Ms Gibb then complained to the Information Commissioner (the Commissioner) who attempted to investigate the matter. The DCA continued to refuse to confirm or deny that it held the information requested and ultimately the Commissioner issued an Information Notice dated 29 January 2007 (the Information Notice) under s.51 FOIA requiring the DCA to furnish:

- 6.1 *Confirmation of whether it holds Attorney General's advice pertaining to the public interest test and its interpretation under the Freedom of Information Act, and*
 - 6.2 *If it is held by the Department for Constitutional Affairs, a copy of the aforementioned advice.*
7. The DCA appeals against this Notice, which is the first such appeal heard by this Tribunal.

Relevant legal provisions

8. The exemption claimed by the DCA under s.35 FOIA so far as it is relevant to this case is as follows:

s.35(1)(c) Information held by a government department is exempt information if it relates to –

(a) ...

(b) ...

(c) *The provision of advice by any of the law officers or any request for the provision of such advice*

s.35(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)

9. This is a qualified class based exemption by virtue of s.2 FOIA and under ss 2(1)(b) and 2(2)(b) is subject to a public interest test under Part I of the Act.
10. Under s.50(1) of the Act any person may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I of the Act.
11. Where the Commissioner has received an application under s.50, then s.51 of the Act provides that the Commissioner may serve the public authority with a notice ("an Information Notice") requiring it to furnish the Commissioner with information relating to the application, to compliance with Part I of the Act or to conformity with the Code of Practice under the Act.
12. There is an limitation or exemption under s.51(5). This reads:

An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of –

- (a) *any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act; or*
- (b) *any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.*

s.51(8) In this section "information" includes unrecorded information.

13. The public authority has a right of appeal to the Information Tribunal against an Information Notice under s.57(2) of the Act.

Background

14. The Department's reasons for refusing to confirm or deny whether it held the advice from the Attorney General in relation to the request were set out in the refusal notice and further explained to the Commissioner by letters of 19 May 2006 and 7 September 2006. These explained why the exemption under s.35(1)(c) and (3) was engaged and what factors the DCA took into account in applying the public interest test and why it decided that the public interest in maintaining the duty to confirm or deny outweighed the public interest in disclosing whether or not the DCA held the information.
15. By letter of 21 August 2006, a senior complaint officer of the Commissioner wrote to the Department in the following terms:

"DCA submissions sent to Ms Gibb and the ICO defend the use of the above provisions of section 35 because of the long-standing convention of not disclosing the advice of Law Officers, or whether their advice has been sought, outside government. Generic public interest arguments were used to defend the continuation of this convention of not disclosing such information in all circumstances. However, as I'm sure you're aware, section 35 is a qualified exemption, requiring an assessment of the public interest test to be made on the merits of each individual case.

At this point, in order to allow this Office to undertake a review of whether we consider the DCA to have dealt with this request in accordance with the provisions of the Act, please provide confirmation of whether the Attorney General's advice on the public interest test and its interpretation under the Freedom of Information Act is held by the DCA. Of course, I can assure you that we have no intention of passing any of the information received from the DCA to the complainant or any third party."

16. By letter of 7 September 2006 the Department refused to accede to the request made in the letter of 21 August 2006 relying, in particular, on s. 51(5)(a) of the Act (ie the provision that public authorities shall not be required to provide the Commissioner with any information in respect of any communication between a lawyer and a client in connection with the giving of legal advice with respect to the client's obligations under the Act).

17. By letter of 20 September 2006, the Commissioner set out his view that:

"[...] the application of section 51(5) will depend on the nature of the advice provided. Whilst obviously the advice in question would relate to the FOI Act it is not clear whether the advice concerned the DCA in its capacity as the government department in charge of implementing the Act or the DCA as a public authority under the Act. Therefore, we do not at this stage consider this provision to be applicable in the context of this case as such advice would not relate to legal advice about a specific FOI case(s) involving the DCA. Rather it would refer to more general advice on the interpretation of the Act, presumably issued before the legislation was enacted."

18. By letter of 5 October 2006, the Department responded by stating:

"On the section 51(5) point, our view remains that as a matter of interpretation section 51(5)(a) is wide and covers both general and more specific advice. The suggestion is that the section does not apply to advice received as part of our general preparation for FOI – and simply to advice on responding to individual requests – appears to us to undermine the very intention behind s 51(5), namely to prohibit the Information Commissioner from receiving a legal advisor's advice on a public authority's obligations, rights and liabilities under the Act."

19. In the Notice, the Commissioner explained (at para 13: p 29):

"13. The Commissioner does not accept DCA's reliance in its letters of 7 September 2006 and 5 October 2006, on section 51(5)(a) in order to refuse to supply him with the requested information. The Commissioner understands that the intention of this provision is to prohibit the supply to the Commissioner of legal advice about the DCA's compliance with the Act in relation to a specific FOI request which the Commissioner is investigating. He does not consider the provision to relate to general advice provided to government departments on the interpretation of the Act's provision. Furthermore, given that the complainant submitted her request on 5 January 2005, it is unlikely that if such information were held it would relate to the DCA's compliance with any specific request."

The DCA's case

20. The DCA's position is that by reason of the exclusion in s 51(5)(a), the Commissioner has no power under 51(1) of the Act to require it to confirm or deny whether it holds

advice from the Attorney General on the “public interest” test and its interpretation under the Act because it argues (the emphasis of the words in italics or underlined are those of the DCA):

- (1) the object of s 51(5) is to provide public authorities with protection based on legal professional privilege in respect of legal advice about matters in relation to which disputes involving authorities *may* be ruled upon by the Commissioner and/or the Commissioner *may* be a party (on appeal). It ensures that the Commissioner does not obtain an unfair advantage – on the very topics on which he has to rule and/or make submissions – vis-à-vis parties who appear before him and parties against which he makes submissions, by using his powers to allow him to be informed whether they have sought legal advice on those topics and what that legal advice might be. No court or opposing party in ordinary proceedings would have a right to be provided with such information, and Parliament has decided that the importance of the right of a party to protection of confidentiality in relation to his legal advice relevant to matters which are the subject of dispute before and/or with another interested person (be it court or opposing party) is such as to warrant this limitation in such circumstances upon the Commissioner’s powers;
- (2) this rationale covers both general legal advice received as to the authority’s rights and liabilities under the Act (the subject of s.51(5)(a)) and more specific advice in relation to proceedings or contemplated proceedings under the Act (s 51(5)(b)). In each case, a court or opposing party would not be entitled to the information in ordinary litigation, and s. 51(5) provides that the Commissioner (as “court” and, then, opposing party) should not be in any better position. The scheme of s. 51(5) makes it clear that Parliament intended both forms of advice to be covered by the exemption from the Commissioner’s powers under s. 51(1);
- (3) s.51(5)(a) covers both the advice itself and the information as to whether or not such advice was obtained/is held by the authority;
- (4) it is irrelevant whether or not any such advice given by the Attorney General to the Department was given to the Department in its capacity as the department responsible for the Act or in relation to the Department’s own liabilities under the Act.

21. These points are developed in turn below.

(1) *The object of s 51(5)*

22. The DCA submits that the object of s.51(5) is to provide authorities with protection in respect of legal advice about matters in relation to which disputes involving authorities *may* be ruled upon by the Commissioner and/or the Commissioner *may* be a party (on appeal):

- (1) Having regard to the role of the Commissioner in adjudicating on disputes under the Act, and then potentially being a party to proceedings on appeal, s. 51(5) is concerned to prevent an authority from being required to disclose to the Commissioner legal advice (and information relating to it in the way specified) which may compromise its position before the Commissioner (and hence also potentially against the Commissioner – ie on appeal). Whilst such protection is in many ways akin to legal professional privilege, s.51(5) is of broader construction so as to recognise the importance of this principle. For example, unlike s.42, s.51(5) is not limited to legal advice in respect of which a claim for legal professional privilege could be maintained in legal proceedings;
- (2) this focus and object of s.51(5) is supported by: (i) the fact that the exemption applies to protect material from disclosure to the Commissioner regardless of whether the Commissioner undertakes not to make onward disclosure of the information to the complainant or third party (as in this case) and (ii) the fact that only legal advice relating to the client's rights and liabilities/proceedings "under this Act" is covered. Where the Commissioner considers legal advice which does not relate to a the client's rights and liabilities/proceedings "under this Act", it is not disputed that, as necessary, the Commissioner does have power under s. 51(1) to order provision to him of that advice in order to review the weighing exercise in relation to it under s. 2 and s. 42 of the Act. The point of s. 51(5) is precisely to delimit that power so as to exclude it in relation to legal advice on the very matters on which the Commissioner may have to rule in relation to the public authority as a party ("legal advice to the client with respect to his obligations, liabilities or rights under this Act");
- (3) this interpretation (preventing the Commissioner from accessing information regarding legal advice in the limited class of case where the legal advice which has or may have been given is to a party before him and against which he may become an opposing party, and is about the very matters on which he may have to rule or present opposing submissions) is consistent – in that limited sub-category of case - with the absolute nature of the legal professional privilege (which ordinarily means that it cannot be overridden by some other higher public interest) and the particularly compelling public interest which that approach at common law reflects. Certainly, the absolute nature of the privilege has been overridden in the Act, in that legal professional privilege (s. 42) is not made an absolute exemption in relation to the general category of legal advice. However, the great force of the public interest in preserving confidentiality across that general category has been acknowledged and repeated by courts at the highest level, so that the courts will maintain non-disclosure of legal advice even where the exercise of the privilege may impede the proper administration of justice in the individual case: see eg *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610, per Lord Scott at paras 25 and 34, per Lord Rodger of Earlsferry at para 54, and per Baroness Hale at para 61. Further, the strength of the public interest in maintaining legal professional privilege is such that it will not be treated as abrogated by general words used in a statute – rather, clear, specific and express language would be required: see *R v IRC, ex p Morgan Grenfell*

[2003] 1 AC 563. It is thus unsurprising that, even though Parliament has in the context of the Act abrogated the common law rule to the limited extent of not making the exemption in s. 42 absolute (so that the public interest will fall to be applied – but, of course, reflecting when it is applied the strong public interest in non-disclosure which has been authoritatively identified by the courts), it has at the same time reflected and preserved in absolute terms in s. 51(5) the common law protection against provision of information about legal advice in that limited class of case which concerns those questions in respect of which the Commissioner is “judge” and potential opposing party;

- (4) this is simply to observe that the limited abrogation of the absolute common law rule in the Act has itself been qualified by way of s.51(5) in the very class of case where the rationale against disclosure of the information to the Commissioner himself is at its most powerful and compelling. Once such information has been disclosed to the Commissioner (who is, in relation to it, a party with an interest), it cannot be undisclosed. The position in respect of this special class of case may be contrasted with the position in relation to legal advice falling outside the context where the Commissioner is himself to be regarded as a party with an interest in the information itself. Where the Commissioner has no interest himself in the topic of the legal advice which has or may have been given, he can properly be regarded as an impartial adjudicator concerned to decide whether information which does not concern himself or the exercise of his functions should be disclosed into the public domain, and it is as such an impartial and disinterested adjudicator/regulator that it may be appropriate for him to require the provision of the information concerned in order to carry out that (impartial) refereeing function (s. 51(1)(b)). But where the Commissioner himself has an interest in the subject of the legal advice, that model does not apply, and his powers under s.51(1) are accordingly limited to the extent of his own interest (s.51(5)).

(2) s 51(5)(a) covers all advice in relation to an authority’s rights and obligations under the Act, not just advice obtained in relation to the particular dispute in question

23. The object of s. 51(5) set out above clearly covers both general legal advice received by an authority as to its rights and liabilities under the Act and more specific advice it has received in relation to proceedings or contemplated proceedings under the Act:

- (1) The Commissioner is not a “one-off” litigant. He is the regulator, who is in a permanent and continuing relationship with the public authority which has or may have obtained legal advice. He may have to rule upon/become party to many disputes concerning the disclosure of information by that authority;
- (2) Legal arguments do not come in discrete, neatly packaged boxes (limited to each case) – they may have implications across more than one case; and the advice given about those arguments in one case may have direct implications for the application of those same arguments in other cases. Indeed, the more general the advice, the more likely it is that it will have

ramifications across a wide range of cases (and in the context of the Act, it is difficult to think of a topic of legal advice which could have more general ramifications than that chosen by Ms Gibb as the subject of her request – indeed, it seems a fair inference that that is one of the reasons why she has chosen that topic);

- (3) As a result of (1) and (2), the Commissioner will himself be an interested party in relation to all legal advice a public authority obtains or may have obtained “with respect to [its] obligations, liabilities or rights under [the] Act”. It makes no difference of substance whether the public authority has taken advice about its obligations in an immediate case before the Commissioner and is applying that advice; or had taken advice about another request and was simply applying the earlier advice by implication to the new case; or had taken general advice at the outset about how it should proceed in relation to a range of cases to follow, and then was applying that general advice to particular cases thereafter as they came forward. In each of these cases, the rationale underlying the limitation in s. 51(5) would apply: the Commissioner himself is so closely involved in the topic of the advice as to have an interest in it, which accordingly disentitles him from being treated as an impartial and disinterested referee. In each case, the legal advice which the authority has or may have obtained, could unfairly compromise its position in proceedings before the Commissioner (or, thereafter, against him);
- (4) The scheme of s.51(5) and its express terms show that Parliament intended all legal advice “with respect to [the authority’s] obligations, liabilities or rights under [the] Act” (s.51(5)(a)) to be covered by the exclusion of the Commissioner’s powers - ie both general or prior legal advice on those topics as well as express legal advice obtained in relation to the particular information request which comes to be the subject of dispute before the Commissioner. Section 51(5)(a) is in general terms which are apt to cover the whole range of these cases. By contrast, s.51(5)(b) is in terms limited to communications (which may consist of legal advice, but may go wider) “made in connection with or in contemplation of proceedings under or arising out of this Act .. and for the purposes of such proceedings”. This language confirms the width of s.51(5)(a). S.51(5)(a) applies to all legal advice in relation to the topics specified (“obligations, liabilities or rights under [the] Act”); s.51(5)(b) only applies in relation to communications for the purposes of proceedings under the Act;
- (5) The Commissioner’s contention that in order for legal advice to fall within the scope of s.51(5)(a) it must be advice relating to a specific case before the Commissioner is unsustainable, and would undermine this clear scheme, by seeking to read s.51(5)(a) as containing by implication the same restrictions as are set out expressly in s.51(5)(b). This is an impermissible approach: Parliament’s intention appears clearly from the words it has used in relation to legal advice in s.51(5)(a), and the fact that it has deliberately used different words in relation to communications in s. 51(5)(b) shows that it did not intend the same limited approach to apply to legal advice;

- (6) Further, the fact that s.51(5)(b) is stated to cover communications with legal advisers (ie including, but not limited to, legal advice) in connection with “or in contemplation of proceedings” indicates that s.51(5)(a) covers also general advice given on issues relating to the potential liabilities of the authority arising otherwise than in relation to specific or contemplated proceedings under the Act, since otherwise s. 51(5)(a) would be otiose.

(3) s 51(5)(a) covers not only the advice itself but information as to its existence

24. The terms of s.51(5)(a) are such as to cover not only the legal advice itself but also the confirmation or denial of the existence of such advice:

- (1) s.51(5)(a) covers “*any information* in respect of *any communication* between a legal adviser and his client *in connection with* the giving of legal advice to the client with respect to his obligations, liabilities or rights under the Act.” “Information” is defined for the purposes of s.51 as including unrecorded information: s.51(8) (is as a departure from the usual definition of “information” set out in s.84, as “information recorded in any form”). Thus the words “any information” in s.51(5)(a) extend more widely than the information to which the request referred to in s.1(1) of the Act relates (which is limited to “information recorded in any form”), and must include the additional information whether the public authority does or does not hold the underlying information in question;
- (2) that is also the clear meaning of the words of s.51(5)(a) quoted above: whether a body does or does not hold legal advice, or has or has not obtained legal advice, is “information in respect of any communication ... in connection with the giving of legal advice ...”;
- (3) this construction is also confirmed by the deliberate width and wide ambit of the words used in s.51(5)(a): “*any information*”, “*in respect of*”, “*any communication*”, “*in connection with* the giving of legal advice”, “*with respect to* his obligations”;
- (4) this construction is also supported by the underlying rationale for s.51(5) – clearly disclosing that legal advice or communications are or are not held may be highly revealing and may compromise a party in litigation, as well as disclosing the advice or the communications themselves;
- (5) the breadth of s.51(5)(a) is further underlined by contrasting it with the more qualified wording of s.42(1) and (2) of the Act, which contains the exemption to the duties under the Act based on legal professional privilege. S.42 provides:
 - (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.*

- (2) *The duty to confirm or to deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.*

S.42(2) clearly limits the exclusion of a duty to confirm or deny, but only to the extent that the requirement to confirm or deny would involve the disclosure of information in respect of which a claim to legal professional privilege would arise. By contrast, s.51(5)(a) contains no corresponding limitation, and applies to all information - without qualification - falling within s. 51(5)(a) (which, on the natural meaning of the words used, includes the information about whether legal advice has been obtained or is held).

(4) *the capacity in which the Department may have received legal advice is not relevant*

25. Finally, it is submitted that it is irrelevant for the purposes of s.51(5)(a) whether or not such legal advice would be about the Department's own general responsibilities under the Act or would relate to the way in which public authorities in general should apply/comply with the Act:

- (1) this submission follows from submission in paragraph 24(2) above; but in addition,
- (2) the distinction here sought to be drawn by the Commissioner is unsustainable in light of the purposes of the policy underlying s.51(5): as advice from the Attorney General to the Department as to the way in which public authorities in general should apply the Act would necessarily constitute advice from the Attorney General to the Department as to how the Department should apply/comply with the Act. As such, the suggestion that s.51(5) does not apply to advice received as part of the Department's general preparation for the Act – and simply to legal advice responding to individual requests - would undermine the object of s.51(5), namely to prohibit the Commissioner from receiving a legal adviser's advice on a public authority's obligations, rights and liabilities under the Act;
- (3) the Attorney General is the Government's chief legal adviser, and the Department (as well as other Government Departments) is his client (regardless of the capacity in which such advice is sought or obtained); legal advice as to the "public interest" and its interpretation under the Act (regardless of whether it was received before or after the coming into force of the Act) would necessarily constitute advice as to the Department's rights, obligations and liabilities under the Act; and confirmation or denial as to its existence would constitute "any information in respect of any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client" in this respect;
- (4) the Department, as an authority in respect of which a complaint has been made under the Act, should not be in a worse position in terms of its ability to

rely on s. 51(5)(a) than any other authority by reason of the fact that it is also the department responsible for the implementation of the Act.

The Commissioner's case

26. The Commissioner points out to the Tribunal that the DCA contends in this case that the Information Notice that was served on it is contrary to s.51(5)(a) of the Act, and that the DCA does not rely on s.51(5)(b). The Commissioner then refers us to two aspects to the Information Notice, which require to be considered separately.
27. The first aspect is the request for confirmation of whether the DCA held the information requested. A request for such confirmation, he argues, cannot in itself be contrary to s.51(5)(a) of the Act. The purpose of the section is to protect the content of certain communications from professional legal advisers; its purpose is not to conceal the mere fact that the communications exist.
28. The Commissioner refers to the DCA's contention that s.51(5)(a) is intended to preserve legal professional privilege (LPP). The purpose of LPP is to protect the content of communications from legal advisers, but it does not enable the recipient of the advice to conceal the very existence of those communications. In ordinary civil litigation documents protected by LPP do not have to be disclosed. However, the person relying on the privilege should still disclose the fact that he holds documents that are covered by LPP, even though he is not required to disclose the content of those documents: see *White Book* Volume 1 2007 at 31.10.3, page 796, citing *Gardner v Irvin* (1878) LR 4 Ex D 49 at 53, CA. The problem with this argument is that the DCA argues that the scope of s.51(5)(a) extends beyond LLP.
29. The DCA has contended in correspondence with the Commissioner that there is a convention neither to confirm nor deny that legal advice has been sought from the Law Officers on a particular matter. That is a consideration that is potentially relevant to the Commissioner's final determination as to whether the Department, by refusing to confirm or deny to Ms Gibbs whether or not it held the information sought, had failed to comply with its duty under s.1 of the Act. The Commissioner submits that the convention referred to by the DCA has however no bearing on the question whether s.51(5)(a) entitles the DCA to refuse to inform the Commissioner whether it holds the advice.
30. The second aspect of the Information Notice is the request for a copy of the Attorney General's advice. The Commissioner's understanding as to the scope of the advice sought is set out in paragraph 26 above.
31. LPP is a single integrated privilege with two sub-heads, namely legal advice privilege and litigation privilege: see generally *Three Rivers Council and Others v Governor and Company of the Bank of England* [2004] UKHL 48. S.51(5)(a) is clearly intended to provide protection for certain documents covered by legal advice privilege, and s. 51(5)(b) is intended to provide protection for certain documents covered by litigation privilege. However, in neither case does the section protect all such documents; s. 51(5) only protects LPP documents that relate to a particular subject matter.

32. The Act has a general exemption for information in relation to which a claim for LPP could be maintained (see s.42) but the exemption is qualified not absolute (see s. 2(3) of the Act). Even where documents are protected by LPP, the public authority will need to consider whether the balance of public interest is in favour of disclosure; and the Commissioner will often need to consider this balance when investigating a complaint. There is nothing in principle surprising about the proposition that the Commissioner may need to examine documents that would ordinarily be protected by LPP: he may need to do so, both in order to satisfy himself that LPP genuinely does apply (and hence that s.42 is engaged) and also to consider the application of the public interest test in respect of s.42.
33. S.51(5) is an important limitation on the Commissioner's ability to use his usual information-gathering powers in support of his decision making and enforcement functions under the Act. The effect of the limitation in s.51(5) is to make it more difficult for the Commissioner to ensure that the s.42 exemption is properly applied by public authorities. For that reason the exemption ought to be given a narrow construction.
34. S.51(5)(a) applies to communications in connection with the giving of legal advice with respect to the client's obligations, liabilities or rights under the Act. The information sought in this case relates to advice not simply about the position of the DCA, but about the position of public authorities generally. It is not information that specifically relates to the position of the client: that is so whether the client is properly to be regarded as the particular Government department to which the advice was given, or as the Crown. The information would relate equally to the position of all bodies that were public authorities under the Act (whether or not they were part of central Government). Nor would the information sought be information with respect to the obligations, liabilities or rights of the DCA or of any public authority. The language of s.51(5)(a) would cover information as to whether a particular public authority was obliged to disclose specific information in response to a particular request; whether it was entitled to treat a particular request as being vexatious; and so forth. The information that the Commissioner is seeking in this case is information that is one stage further back from this. It is not information about what are the obligations, etc., of the DCA: rather it is information as to how the DCA or other public authorities ought to go about determining what are their rights and obligations in a particular case.
35. To put the point another way, the Information Notice in this case does not relate to legal advice in the usual sense. It relates to information that is more closely analogous to internal guidance used within government departments about the application of legislation. Such information may be protected by LPP and may be exempt from disclosure under s.42 (subject to the public interest test) but it does not follow that it must be exempt under s.51(5)(a) in respect of the Commissioner's information-gathering powers.

The Tribunal's findings

36. The Tribunal finds the DCA's arguments as to why the Information Notice is subject to s.51(5) FOIA to be very persuasive. The basis of this limitation or exemption from compliance with an Information Notice is so as not to give the Commissioner an unfair advantage in matters he may be called to rule upon or be a party to.
37. We accept the DCA's detailed submissions in this case which are set out at paragraphs 22 to 25 above.
38. Clearly the complication in this case is that the request relates to legal advice, whether it exists or not, from a Law Officer about the application of the public interest test under the Act to a government department who is also the sponsoring department of the Act. The DCA is a public authority in its own right and could use such advice in respect of its own obligations, liabilities or rights under FOIA. Also as sponsoring department it may provide guidance to other government departments in relation to their obligations under the Act or more broadly use it to advise government on the Act. We agree that the capacity in which the DCA may have received the legal advice is irrelevant for the purposes of s.51(5)(a).
39. The Tribunal appreciates the argument of the Commissioner where LPP is claimed that he may need to inspect privileged materials in order to establish whether or not the exemption is made out. An example might be where a local authority has taken legal advice on a planning appeal which then becomes the subject of a FOIA request. However where the legal advice relates specifically to the Act then s.51(5) comes into play and he cannot inspect the information because of the unfair advantage it may give him.
40. We therefore find that the s.51(5)(a) exemption applies and uphold the appeal and find that the DCA is not obliged to comply with the Information Notice.
41. We agree with the Commissioner that he has the right under s.51 to require a public authority to disclose whether or not it holds the information requested, and note that s.51(8) extends the meaning of "information" to unrecorded information. However, in this case, where the exemption claimed allows for the exclusion from the duty to confirm or deny and s.51(5)(a) applies then in our view the DCA does not have to comply with this part of the Information Notice for the reasons set out above.
42. Also we agree with the Commissioner that the convention, referred to in paragraph 15 above, to neither deny nor confirm that legal advice has been sought from Law Officers on a particular matter has no bearing on the question whether s.51(5)(a) entitles the DCA to refuse to inform the Commissioner whether it holds such advice, despite the fact the qualified exemption claimed does allow exemption from the duty to confirm or deny. However we consider, but make no finding on the matter, that the convention is a factor that would need to be taken into account when considering the application of the public interest test.

The continuing process

43. We would comment that our decision does not prevent the Commissioner from continuing his investigation and making a decision in this case. Clearly the Commissioner can still consider whether the exemption is engaged and can also consider the application of the public interest test.

John Angel
Chairman

Date 6 August 2007