

IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2014/0190**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50532545

Dated 7th July 2014

BETWEEN

Mr Andrew Partridge

Appellant

And

The Information Commissioner

Respondent

And

Cabinet Office

Second Respondent

Determined on 21st November 2014 at Field House

Date of Decision 18th December 2014

BEFORE

Fiona Henderson (Judge)

Narendra Makanji

And

Steve Shaw

Mr Partridge represented himself,

Counsel for Information Commissioner– Mr Robin Hopkins

Counsel for the Cabinet Office – Mr Rory Dunlop

Subject matter:

S41 FOIA – confidentiality of information

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS FS50532545 dated 7th July 2014 which concluded that the Information Commissioner's Office had

correctly applied s44(1)(a)¹ FOIA by virtue of s59 of the Data Protection Act 1998².
The Appellant appeals against this decision.

Background

2. On 21st September 2011 the Department for Education (DfE) press office issued a statement asserting that:
*“The Cabinet Office is clear that private email accounts do not fall within the FOI Act”*³.
They were also quoted as stating:
“the Cabinet Office is clear that private email accounts do not fall within the FOI Act and are not searchable by civil servants”.
3. The DfE received a request for information on 31st January 2012 from someone other than Mr Partridge for copies of guidance it had received from the Cabinet Office on the use of private emails for conducting official government business. This was withheld and the complaint was referred to the Commissioner for investigation. During the currency of the investigation the Commissioner received a copy of the withheld information. The Commissioner issued decision notice FS50483307 on 18th June 2013 (the June 2013 decision) which upheld the DfE’s refusal.
4. The Appellant is the former head of the Information Rights Team at the DfE and was working there in 2011. He had seen the Cabinet Office guidance in the course of his employment although no longer has a detailed recall of its contents. He does not agree with the Commissioner’s reasoning in the June 2013 decision that this Cabinet Office guidance was “the very earliest step” in government thinking⁴, relying upon the ICO’s published guidance in 2009 and his own recollection of guidance that was being given in the DfE prior to that date.

¹ Disclosure prohibited by or under any enactment

² Prohibition on unlawful disclosure of information relating to an individual or business received by the Commissioner under or for the purposes of FOIA.

³ Reported in FT article dated 21.11.11

⁴ Para 15 of FS50483307

The Information Request

5. On 1st November 2013 Mr Partridge wrote to the Information Commissioner as a public authority asking for a copy of the advice withheld in the June 2013 decision.⁵ This was refused on 28th November 2013 relying on s44(1)(a) FOIA by virtue of s59 DPA. The decision was upheld on internal review on 3rd January 2014. The Appellant complained to the Commissioner arguing that the main point of the withheld information was in the public domain, so that s59(1)(c) was not made out as the information had been disclosed to the public. The Commissioner upheld the reliance on s44 FOIA in his Decision Notice FS50532545 (Partridge 1).

6. On 28th November Mr Partridge made a second fuller request this time to the Cabinet Office for “*all the Cabinet Office advice and guidance*” that was issued to the DfE relating to the use of private emails for conducting government business in 2011. This was refused under s36 FOIA and following the decision being upheld on internal review Mr Partridge appealed to the Commissioner. The Commissioner issued decision notice FS50532754 (Partridge 2) which required the Cabinet Office to disclose the information. The Cabinet Office have appealed that decision and the case has yet to be heard. The Cabinet Office have confirmed to the Tribunal that the disputed information in Partridge 1 (the subject of this appeal) is included in the disputed information in Partridge 2.

The Appeal

7. The Appellant appealed on the grounds that s59(1) DPA was not applicable because:
 - a) Neither the DfE nor the Cabinet Office is a business for the purpose of DPA s59(1)(b),
 - b) the main point of the withheld information was previously available to the public from other sources so DPA s59(1)(c) is not satisfied,
 - c) the disclosure is necessary in the public interest and therefore made with lawful authority under DPA s 59(2)(e).

⁵ A supplementary request asking for information shedding light on the Commissioner’s conclusions relating to the first half of paragraph 22 of the June 2013 decision notice was refused and is not subject to appeal.

8. In his reply the Commissioner opposed these grounds of appeal for the reasons set out in his decision notice, he also relied upon s41(1) FOIA in the alternative⁶. The Cabinet Office were joined by the Tribunal and supported the Commissioner's response.
9. The Tribunal has received an open bundle and open written and oral submissions from all the parties. Mr Partridge very helpfully provided a chronology, a digest and an analysis of the statements in the public domain and a schedule of comparative examples of statutory restrictions on disclosure in other legislation. The Tribunal has also received a copy of the disputed information which was not shown to Mr Partridge pursuant to r14 GRC rules. The Tribunal heard some argument in closed session relating to the specific content of the closed material comparing the open statements as set out in Mr Partridge's schedule with the actual text of the disputed information. The Tribunal has set out its reasoning relating to the closed arguments with specific reference to the content of the withheld information in a closed annex.

Scope of the Appeal:

10. There was no dispute that the Commissioner was entitled to raise s41FOIA at the appeal despite not having raised it earlier. The Tribunal therefore had to consider the most proportionate order in which to hear arguments. The Tribunal had regard to the over-riding objective as set out in rule 2 of the GRC rules and was satisfied that it was in the interests of justice to hear first arguments relating to the quality of confidence / whether the information was now publicly available. The Tribunal would then give an oral finding without reasons on this aspect of the appeal as if it was found that the disputed information had already been disclosed, neither exemption relied upon by the Commissioner could succeed. If the Tribunal found that it had not been disclosed it would be necessary to consider the public interest arguments relating to s59(1)(c) DPA and the reasonable justification defence to breach of confidence. It was proportionate to hear these arguments first as it was likely that they would be determinative of the appeal. The Tribunal was satisfied that hearing arguments that were not necessary to determine the appeal would be of academic interest only and as

⁶ Disclosure would be an actionable breach of confidence

the First Tier Tribunal is not a court of record would serve no useful purpose. The Tribunal took into consideration the resources of the parties and the additional time likely to be spent arguing the point in reaching this decision.

11. The Tribunal has refused the appeal on the grounds that the information is properly withheld under s41 FOIA we have not therefore gone on to make a determination under s44 FOIA.

Information Provided in Confidence

12. S41 FOIA provides that:

(1) Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and*
- b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

Information obtained in circumstances which imposed a duty of confidence at common law/equity

13. We are satisfied that this exemption is engaged and this was indicated orally at the hearing. The reasoning is set out below.
14. It was accepted that the disputed information was obtained by the Commissioner pursuant to his investigation under s50 FOIA in relation to the June 2013 case. The Tribunal heard argument relating to whether there were any other circumstances in which the Commissioner had obtained the information such that it was not received in circumstances imposing a duty of confidence:
 - i) Mr Partridge quoted from decision notice FS50422276 and argued that the Commissioner had also received a copy of the disputed information in relation to that case. All parties agreed that if this was the case it did not alter the legal position as this would be information received pursuant to s50 FOIA.

ii) Although Mr Partridge raised arguments that:

- a) the disputed information might have been provided to the Commissioner when he was undertaking his good practice investigation of the DfE in October – December 2011 and
- b) that the disputed information might have been contained in a draft open bundle of an appeal that was subsequently withdrawn,

Mr Partridge accepted that there was no evidence before the Tribunal supporting either of these contentions and he did not pursue them. He confirmed that he was content for the Tribunal to proceed on the factual basis that the disputed information was obtained and held by the Commissioner only in relation to investigations under s50 FOIA.

15. We rely on the Memorandum of Understanding⁷ (signed 24 February 2005 between the Secretary of State for Constitutional Affairs (on behalf of government Departments) and the Information Commissioner on co-operation between Government Departments and the Information Commissioner in relation to section 50 FOIA) in concluding that the information was given in circumstances in which the Commissioner owed an explicit duty of confidentiality to the public authority who provided the information⁸. We are therefore satisfied that it was imparted under circumstances which imposed a duty of confidence at common law.

Quality of Confidence

16. Mr Partridge's case was that the information no longer had the necessary quality of confidence about it (and that consequently no action could have been taken for breach of confidence by DfE or anyone else). He argues that its substance had been disclosed both by the DfE in its press releases and also as summarised by the Commissioner in the June 2013 decision notice and decision notice FS50422276⁹.

17. Mr Partridge argued that the following elements of the advice were in the public domain:

⁷ OB p 175 et seq

⁸ Paragraphs 7 and 9-11

⁹ As set out in appendix ii p82 OB

- a) the advice asserted that private email accounts did not fall within FOIA,
- b) civil servants/government departments did not have the authority to search private email accounts when seeking to answer FOI requests,
- c) the advice was given by an official in the cabinet office¹⁰,
- d) the advice was written in an informal manner¹¹.

Mr Partridge argued that if the Commissioner's case was that the information was not disclosed because in summarising the advice different words were used (even if they amounted to the same thing) that would be sophistry and the fact remained that the content of the advice had been disclosed.

18. The Cabinet Office argued that if elements of the disputed information had been disclosed then it would be available to the Commissioner to rely upon s21 FOIA (information accessible by other means) and that the fact that this had not been relied upon was indicative of the strength of the view that the disputed information had not been disclosed.

19. The Commissioner (supported by the Cabinet Office) argued that:

- a) The author or authors of the advice, their role and seniority had not been disclosed,
- b) the date/ time and circumstances of the advice had not been disclosed,
- c) the exact recipient or recipients had not been disclosed,
- d) The words used in the public statements were not the same as those in the withheld material. The wording matters as it conveys the specific meaning being conveyed and how the parties express themselves.
- e) The elements included in the construction of the advice e.g any reasoning, the factors taken into consideration, the depth of analysis and the way that they are expressed have not been disclosed and the document has therefore not lost its quality of confidence.

¹⁰ Para 10 of FS50483307 the June 2013 decision

¹¹ Para 15 of FS50483307 the June 2013 decision

20. We agree with the Commissioner's arguments as set out above having had regard to the withheld material and compared it to the material in the public domain as set out in Appendix ii of the Open bundle at p 82. We have provided more detailed reasoning with specific reference to the content of the withheld material in the closed annex.

Public Interest Defence

21. Mr Partridge set out detailed arguments about the inherent public interest in the disclosure of the information, he took support in the weight of these inherent public interests by the fact that in Partridge 2 the Commissioner has found that the public interest in favour of disclosure under s2(2)(b) FOIA outweighs the public interest in withholding the information (although it is accepted that the Cabinet Office do not agree and are appealing this decision).
22. We remind ourselves that the consideration of whether a public interest defence would succeed has a higher threshold than the public interest test under s2(2)(b) FOIA. In the former the burden would be upon the Commissioner to show that (in the absence of any obligation under FOIA) the public interest in favour of disclosure was sufficient to justify the breach of confidence by the Commissioner. The Commissioner and Cabinet Office's case was that the key issue before the Tribunal was whether it was in the public interest for the Commissioner to disclose the information (rather than the author(s) or recipient(s) of the information).
23. They argued that there was no justification for disclosure by the Commissioner because:
- a) the inherent public interest in disclosure of the information could be determined by requesting the information under FOIA from either the Cabinet Office or the DfE.¹²

¹² which will in due course happen as Mr Partridge has now applied for the information from the Cabinet Office in Partridge 2

b) This is more appropriate as the Cabinet Office and DfE are in a better position to argue the public interest considerations applicable (as the authors and recipients of the advice) at the date of the request,

c) the negative consequences of disclosure by the Commissioner in breach of confidence would be very harmful to the carrying out of his statutory functions and this was entirely unnecessary because of the alternative route of requesting the information from the Cabinet Office/DfE that was reasonably available at the time.

24. We agree with these arguments. Mr Partridge conceded that there was no specific time pressure or urgency in the disclosure of the information (it was not linked to an impending deadline). He argued that he had applied to the Commissioner because he believed that he would process the case more swiftly than the Cabinet Office. This belief was anecdotal but even if it had been demonstrated through a proper analysis we are not satisfied that it would be a sufficiently compelling argument in the absence of a deadline to justify the breach of confidence.

25. He also explained that he had applied to the Commissioner because he anticipated arguments about whether the information was still held by the Cabinet Office in light of responses to other information requests that he was aware of. However, this amounted to speculation and he had not sought to clarify this at the relevant date.

26. He added that as he was requesting other information from the Commissioner it seemed expedient to deal with one public authority, however, administrative convenience is not in our view a compelling argument and he conceded that he could have separated the requests.

27. He further argued that the Commissioner was the cause of his wish to have the information disclosed because he believed the Commissioner's assertion that the advice was "*the "very earliest step" in the government's thinking on this issue*" was a serious distortion or suppression of fact.¹³ We repeat that he would be in a position to mount these arguments were the information disclosed under FOIA by the DfE or

¹³ Para 15 of FS50483307 the June 2013 decision

Cabinet Office and that the Commissioner seeking to justify his own decisions would not justify a breach of confidence.

28. He raises the point that the Commissioner did not issue advice and assistance to him under s16FOIA when he made his request. We are not satisfied that this is material to the issues that we have to determine. It was apparent from the context of the request and the Decision Notice it referred to (June 2013 case) that the Cabinet Office and DfE were likely to have the information and that it was open to Mr Partridge to request it from them. He did in fact do so without advice and assistance being offered once he received the refusal notice on 28th November 2013.
29. In concluding that a public interest defence would not be likely to defeat an action for breach of confidence if brought we agree with the Commissioner's arguments that:
- i) there is an inherent strong public interest in maintaining confidence and this is reflected in the fact that s41FOIA is an absolute exemption and not subject to the s2(2)(b) FOIA balancing test but the higher threshold of the reasonable justification defence.
 - ii) if public authorities lost confidence that the Commissioner would not disclose information given to them in confidence, they would be reluctant or unwilling to share the requested information. Whilst Mr Partridge contends that on site inspections already happen, we are satisfied that this would be likely to increase and this would impact negatively upon the swift and efficient relationship between the Commissioner and public authorities with an increase of:
 - a) Inspections on site without the Commissioner being given a copy of the information so that the Commissioner could never be said to "hold" the information. This is more expensive, time consuming and creates obstacles in the adequate consideration and investigation of a case.

- b) The Commissioner having to exercise his powers to issue more Information Notices¹⁴ . These can be appealed and add additional expense, burden, uncertainty and delay into the process.

Conclusion

28. For the reasons set out above and in the closed annex we refuse this appeal. Our decision is unanimous

Dated this 18th day of December 2014

Fiona Henderson
Tribunal Judge

¹⁴ S51 FOIA