



IN THE FIRST-TIER TRIBUNAL Appeal No: EA/2014/0226 & 0228
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50532809
Dated: 18 August 2014

The Information Commissioner's Decision Notice No: FS50533887
Dated: 18 August 2014

Appellant 0226: Ranjan Nadarajah

Appellant 0228: Mohamed Abdalla

Respondent: The Information Commissioner

2nd Respondent: Ministry of Justice

Heard at: Fleetbank House, London

Date of Hearing: 26 June 2015

Before

Chris Hughes

Judge

and

Alison Lowton and Steve Shaw

Tribunal Members

Date of Decision: 14 July 2015

Date of Promulgation: 16 July 2015

Appearances:

For the Appellants: David Ball
For the Respondent: Eric Metcalfe
For the 2nd Respondent: Robin Hopkins

Subject matter:

Freedom of Information Act 2000 s44

Cases:

SC (Children) [2010] EWCA Civ 21

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notices dated 18 August 2014 and dismisses the appeals.

REASONS FOR DECISION

Introduction

1. The Legal Services Commission (“LSC”), was an executive agency of the Second Respondent, the Ministry of Justice (“MOJ”) responsible for the administration of legal aid. It was replaced in 2013 by a new executive agency of the MOJ, the Legal Aid Agency (“LAA”) with a similar role.
2. In 2010 it conducted a public procurement exercise with a view to awarding contracts to firms of solicitors to represent legally aided individuals in civil cases. There were difficulties in the conduct of the tendering exercise, notably with respect to the use of the technology for submitting tenders. A number of firms which were unsuccessful in the tender exercise (including Mr Nadarajah’s firm) launched judicial review proceedings in an attempt to demonstrate that the firms had been unlawfully treated and should be funded to carry out this work. The course of litigation varied in each

case and at least one case (not relating to Mr Nadarajah's firm) is still before the courts.

3. In one joined case (R (ota Hersi and Co, Harrow Solicitors) v Lord Chancellor) a consent order was agreed by the parties as to the material to be disclosed by the MOJ and put before the court to enable it to compare the attributes and situations of firms which had been awarded contracts with firms which had not, in order to consider whether the relevant differences were lawful grounds for the decisions on whether or not to award contracts.
4. The information about the firms had been submitted to the MOJ by the firms (or derived from such information) and was clearly confidential commercial information about those firms. There were three distinct provisions relating to confidentiality; clauses 4 (which provides for anonymization), 6 (which relates to material disclosed to the Claimants) and 7. Clause 7 provides:-

The names of comparator firms in the pleadings shall be treated as confidential. The parties shall file a covering note with the pleadings stating that the details of third party firms are confidential and that the pleadings should not be disclosed to anyone other than the parties save with the express permission of the Administrative Court.

The Court shall refer to all these firms by their anonymization numbers and no person shall report or disclose the names of these third party firms or the detail of the information requested to be clarified by the Defendant save with the express permission of the Administrative Court”.

5. On 29 December 2013 Mr Abdalla (who is believed by the Second Respondent to be associated with a solicitor still pursuing litigation arising out of the tender exercise) wrote to the MOJ to make a FOIA request:-

“I would like to obtain information and comments concerning an organisation called [solicitor A].

Could I obtain copies of any correspondence (including letters, emails, representations [sic] etc between the then LSC and [solicitor A} between the dates of 15 June 2010 and 5 December 2010.

Please include the letter before claim received from [solicitor A] and the LSC's reply to it.

Please confirm whether [solicitor A] obtained a contract because another organisation had its allocation of cases (New Matter Starts) withdrawn. If yes what is the name of the organisation that had its allocation of cases withdrawn and the number of cases that became available as a result of that withdrawal.

On what date did the LSC first informed [sic] [solicitor A] about the fact that its tender was successful.”

6. On 26 December 2013 Mr Nadarajah sought remarkably similar information about the same firm as well as seeking information about another firm involved in the tender process:-

“Could I have copies of any correspondence between the LSC and [solicitor B] regarding the process which led to the award of a full civil contract in 2011.

Particularly between June 2011 and November 2011 concerning the issue of awarding a full immigration contract in 2011.

Please confirm who initiated the process which led to the award of a contract at that time to [solicitor B].

Please confirm whether [solicitor B] submitted any new tender documents at the time in question such as supervisor declaration form. I understand that [solicitor B] initial tender expired on or about 28 April 2010. Furthermore, between January 2010 and September 2011 the accreditation of [solicitor B] supervisor expired and this caused a delay for the award of the contract to take place. Please confirm if any of those facts are correct.”

7. The MOJ responded to both requests deeming them to be vexatious and maintained that position on review. The Appellants complained to the First Respondent the Information Commission (“ICO”) who conducted an investigation. He concluded that the requests were not vexatious, however he accepted the MOJ’s second argument that to disclose the information would be in breach of the court order and on that basis upheld the MOJ’s refusal to supply information. The appellants have appealed against this decision. The MOJ has been joined as a party to these proceedings.

The appeal to the Tribunal

8. The issue before the tribunal is very simple. Mr Nadarajah has at some stage been given access to some of the comparator material. Mr Abdalla believes that the information he has requested relates to a comparator firm. The question for the tribunal to determine is whether the disclosure of the information requested about a comparator firm would be in breach of the provision of the order set out at paragraph 3 above, since s44 FOIA provides:-

“44.— Prohibitions on disclosure.

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any EU obligation, or

(c) would constitute or be punishable as a contempt of court.

...”

9. On behalf of the Appellants it was argued that the order was imprecise and not time limited and that therefore if the MOJ were to disclose the information, it would not constitute a contempt of court. Reliance was placed on *SC (Children)* [2010] EWCA Civ 21 (an appeal against an order for committal to prison for contempt) where it was held (paragraph 17):-

Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specific time frame. The person or persons affected must know with complete precision what it is they are required to do or abstain from doing”

10. The Commissioner relied on the findings in his decision notice. The information requested fell within the terms of the order and therefore the exemption was engaged. The Order expressly provided that information should not be disclosed without the express permission of the Court. The order was and remains live. To disclose the information would be to breach the Order and therefore be punishable as contempt. The MOJ supported this position. The MOJ placed before the Tribunal in closed session the schedule of documents before the Court in the judicial review proceedings stating that “the schedule extends to the information about the named firms of

solicitors to whom the Appellants requests under FOIA relate, and that this information is therefore caught by the Court Order.”

Consideration

11. The tribunal noted that the factual circumstances were very different from the underlying situation in *SC* . The court order was a consent order in commercial litigation. It was agreed between the parties to the litigation in order to deal with the issue of confidential material relating to third party firms of solicitors who were not involved in the litigation but who seemed to be relevant comparators so as to enable the Court to evaluate the claim by the firms seeking judicial review that they had been unfairly treated. In order for the comparison to be of any use to the Court it would clearly have been necessary for the information about these solicitors to go beyond their names and to include a range of information about the firms which was relevant to the decision as to whether they would be awarded a contract.
12. The comparison would involve a range of commercial information relating to issues which, in the view of the LSC, were relevant to its decision whether or not to award the contract. In the nature of a tender for services it is inevitable that among the information likely to be assessed in determining whether or not to award a contract is likely to be information relating to the financial history and robustness of the firm, the skills experience and professional histories of the individuals providing the service, the structures underpinning the provision of the proposed services and the history of the assessment process with respect to that firm carried out by LAA. The focus of these FOIA requests is on the history of the assessment process and contact between the LAA and the comparator firm during this period.
13. The consent order was agreed between parties who knew what the issues in the litigation were and was written in order to protect the commercial confidentiality of the comparators; the judge made an order to give effect to that agreement and to provide that the information should be disclosed to the Claimants in the judicial review on a confidential basis purely for use in that litigation.
14. In essence the Appellants in these proceedings wish to revisit or further explore issues concerning comparator firms from the judicial review proceedings. They wish to re-open through FOIA requests issues which could have been or were addressed in

judicial review and which were then subject to the usual rules with respect to disclosure for the purposes of litigation.

15. The order states:-

no person shall report or disclose the names of these third party firms or the detail of the information requested to be clarified by the Defendant save with the express permission of the Administrative Court

16. While the names of third party firms may be known to Mr Nadarajah that information is not in the public domain, furthermore the “detail of the information” is not in the public domain. The request would require the MOJ to disclose information which it knows is protected by a Court Order designed to maintain the confidentiality of litigation disclosure. It does not require anything to be done within any specific time, rather it requires something not to be done ever.

17. The tribunal is satisfied that these requests are attempts to bring into the public domain information which is protected by Court order from disclosure. The appeals are without merit and are dismissed.

18. Our decision is unanimous

Judge Hughes [Signed on original]

Date: 14 July 2015