



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

EA/2015/0160

THE MINISTRY OF JUSTICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

JOANNA SHAW

Second Respondent

Date of Decision: 18 March 2016

Date of Promulgation: 23 March 2016

Hearing

Held on 3 February 2016 at Fox Court on the papers.

Before Anne Chafer, Nigel Watson and Judge Claire Taylor.

Decision

The appeal is unanimously upheld for the reasons set out below. The Appellant is not required to disclose the information and no steps are required to be taken.

Reasons

Background

1. The Ministry of Justice ('MoJ') is the public authority to whom the request was made for the purposes of the Freedom of Information Act 2000 ('FOIA'), where the Legal Aid Agency ('LAA') is an executive agency of the MoJ.
2. Section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012¹ (LASPO) outlines the general rules for the availability of civil legal aid. Section 10 of LASPO provides for funding for cases falling outside the scope of Section 9. It is referred to as 'Exceptional Case Funding' (ECF).
3. Legal professional privilege is divided into litigation privilege and legal advice privilege ('LAP'). This appeal concerns the latter.

The Request

4. On 3 December 2014, the Second Respondent requested from the Legal Aid Agency ('LAA'):

"I am making a request under the Freedom of Information Act for the following information:

1. Guidance provided to LAA on Exceptional Case Funding

2. Any training notes or additional guidance regarding Exceptional Case Funding

I have seen the Lord Chancellor's Guidance at [online web address] and am aware of this. I am seeking a release of any other guidance including training notes relating to Exceptional Cases Funding".

5. On 19 January 2015, the MoJ provided some information. It withheld Microsoft PowerPoint slides prepared by external counsel to advise the LAA on the ECF rules, claiming that under s.42 FOIA (*concerning legal professional privilege*) these were exempt from disclosure.

6. On 19 January, the Second Respondent requested an internal review stating:

"I am not an expert in these matters, but it appears that, if this is correct, a public authority could exempt itself from almost any request for information by using the services of Counsel or a solicitor to provide advice on the government matters, thereby exempting itself from any obligations under FOIA. This cannot be what was intended by the legislation."

7. The requester persevered, and following an investigation, the Information Commissioner's Decision Notice of 30 June 2015 concluded that the s.42 FOIA exemption was not engaged. Its reasons included:

- (i) The question of whether information is covered by legal advice privilege ('LAP') is a question of fact, requiring careful consideration of the relevant information in context.

¹ LASPO came into force on 1 April 2013.

- (ii) LAP covered confidential communications between a client and lawyer made for the dominant purpose of seeking or giving legal advice.
- (iii) The requested information did not appear to have been produced for the dominant purpose of providing legal advice. The primary motivation in its production was to provide generic training for LAA caseworkers regarding the determination of applications for ECF. Accordingly, the information was not covered by LAP.

8. The Appellant now appeals this decision.

The Law

- 9. Under s.1(1) of FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him, unless it is exempt from disclosure under the Act.
- 10. For our purposes, information is exempt where (a) it satisfies the exemption in s.42(1) FOIA; and (b) *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”*. (See s.2(2)(b)FOIA - referred to here as the ‘public interest test’).
- 11. Section 42(1) FOIA provides:

“42(1) Information in respect of which a claim to legal professional privilege or [...] could be maintained in legal proceedings is exempt information.”
- 12. The Tribunal’s task is therefore to: consider whether the withheld information falls within the exemption for legal professional privilege (‘Issue 1’); and if so, to consider what is frequently called the public interest test (‘Issue 2’).

Issue 1. Legal professional privilege

- 13. Legal professional privilege comprises two limbs, LAP and ‘litigation privilege’. It gives the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication or document in question. The MoJ relies here on LAP. This is concerned with confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance.
- 14. The rules have been crafted and developed by the Courts over time distilling its features, scope and rationale.

LAP: Features

- 15. The Supreme Court discussed it in *R (Prudential plc & another) v Special Commissioner of Income Tax & another* [2013] UKSC 1, [2013] 2 AC 185, where Lord Neuberger guided us as follows:

“17. Where legal professional privilege ... attaches to a communication between a legal adviser and a client, the client is entitled to object to any third party seeing the communication for any purpose, unless (i) the client has agreed or waived its right, (ii) a

statute provides that the privilege can be overridden, (iii) the document concerned was prepared for, or in connection with, a nefarious purpose, or (iv) one of a few miscellaneous exceptions applies ...

19. In summary terms, as is common ground on this appeal, LAP applies to all communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice, i.e. advice which “relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law” – Three Rivers (No 6), [2005] 1 AC 610, para 38, per Lord Scott.” (Para.s 17 and 19. Emphasis Added.)

16. In *Three Rivers District Council & others v Governor & Company of the Bank of England* (No. 6) [2005] 1 AC 610 (*‘Three Rivers’*), Lord Scott stated:

“First, legal advice privilege arises out of a relationship of confidence between lawyer and client. Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or document is not by itself enough to enable privilege to be claimed but is an essential requirement.

*Second, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute (c/f *R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563), but it is otherwise absolute. There is no balancing exercise that has to be carried out (see *B v Auckland District Law Society* [2003] 2 AC 736 paras.46 to 54)...” (Para.s 24-25. Emphasis Added.)*

LAP: Rationale

17. The rationale or policy for LAP has been explained in *Three Rivers*² as follows:

“...Why is it that the law has afforded this special privilege to communications between lawyers and their clients that it has denied to all other confidential communications? In relation to all other confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality of the communication, will protect the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice. In relation to all these other confidential communications the law requires the public interest in the preservation of confidences and the private interest of the parties in maintaining the confidentiality of their communications to be balanced against the administration of justice reasons for requiring disclosure of the confidential material....

² See paragraph 28 to 33 of *Three Rivers*. For the avoidance of doubt, the contents of paragraph 17 of this decision is quoting from *Three Rivers*, which itself quoted from the US Supreme Court case of *Upjohn Co. v United States* (1981) 449 US 383.

In R v Derby Magistrates' Court Ex parte B [1996] 1 AC 487 Lord Taylor of Gosforth CJ said this -

“In Balabel v Air India [1988] Ch. 317 the basic principle justifying legal professional privilege was again said to be that a client should be able to obtain legal advice in confidence. The principle which runs through all these cases ... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent..”

...In Upjohn Co. v United States (1981) 449 US 383...a decision of the US Supreme Court,

“... to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”

... in A M & S Europe Ltd v European Commission [1983] QB 878 at 913, a passage cited by Kirby J in Daniels Corp v ACCC [2002] 192 ALR 561. The Advocate-General said this -

“[The privilege] springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.” (Emphasis Added.)

LAP: Scope

18. The scope of LAP has been explained in *Three Rivers* as follows:

“It is clear...legal advice privilege must cover also advice and assistance in relation to public law rights, liabilities and obligations...”

It makes no sense at all, in my opinion, to withhold the protection of that privilege from presentational advice given by the lawyers for the purpose of preventing that criticism from being made in the first place...” (Paras.37-36)

38. In Balabel v Air India [1988] 1 Ch 317 Taylor LJ (as he then was) said that for the purposes of attracting legal advice privilege –

“... legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.” (p.330)

I would venture to draw attention to Taylor LJ’s reference to “the relevant legal context”. That there must be a “relevant legal context” in

order for the advice to attract legal professional privilege should not be in doubt. Taylor LJ said at p 331 that –

“ ... to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide.”

This remark is, in my respectful opinion, plainly correct. If a solicitor becomes the client's "man of business", and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one.” (Para 38. Emphasis Added.)

“... Advice given by lawyers to the promoters of private bills was mentioned. I would myself be in no doubt at all but that advice and assistance given by lawyers to promoters of private bills, although often, perhaps usually, presentational in character, would qualify for legal advice privilege. The relevant legal context seems to me clear. The same would apply to advice by lawyers given to opponents of the proposed bill...” (Para 40).

“Mr Pollock referred to advice sought from and given by a lawyer as to how to set about joining a private club. He put this forward as an obvious example of a case where legal advice privilege would not be attracted. The reason, Mr Pollock suggested, was that the advice being sought would not relate to the client's legal rights or obligations. I agree that legal advice privilege would not be attracted, not because the advice would necessarily not relate to the client's legal rights or obligations but because the bare bones of Mr Pollock's example had no legal context whatever...” (Para 42).

Issue 2. Public Interest

19. The First-Tier Tribunal has often considered that there is a strong public interest in non-disclosure in-built into legal professional privilege, and some Tribunals have regarded the decision by the High Court in *DBERR v O'Brien and IC* [2009] EWHC 164 (QB) as authoritative guidance for this, where it is stated:

“In the light of the consistent line taken by the Tribunal as to the weight to be attached to the public interest against disclosure in-built into legal professional privilege (an approach which I have found to be the correct one) it was incumbent upon the Tribunal in the instant case to give significant weight to that interest. Further the Tribunal was obliged to consider whether the weight to be given to the public interest considerations militating against disclosure were countered by considerations of at least an equal weight which supported an order for disclosure.” (Para 48. Emphasis Added.)

20. We also have regard to Lord Scott’s statement set out in paragraph 16 above, that where a document qualifies for legal professional privilege, the privilege is absolute, but can be overridden by statute. In this case, the FOIA provides that we must consider the balance of the public interest test when s.42(1)FOIA is in play, such that LAP is not absolute for our purposes.

The Task of the Tribunal

21. Our task is to consider whether the decision made by the Commissioner is in accordance with the law or whether any discretion he exercised should have been exercised differently. The Tribunal is independent of the Commissioner, and considers afresh the requester’s complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.
22. We have received the Appellant’s grounds of appeal, submissions and witness statement, the Commissioner’s response as well as a bundle of documents including the requested information disclosed to us on a closed basis. We have considered all of these documents, even if not specifically referred to below. The Second Respondent has chosen not to provide submissions.

Evidence from Appellant

23. The MoJ provided a witness statement from the lawyer heading LAA’s ‘High Costs Civil and ECF’ Team which processes ECF applications. This included:
- a. It is important to the LAA and the wider public interest that the LAA applies the ECF regime correctly, in accordance with the law.
 - b. Accordingly, Martin Chamberlain QC and Katherine Apps as independent external counsel were instructed to provide advice in the form of training to the ECF team.
 - c. As the team applies s.10 LASPO, it was decided that external counsel deliver their advice directly to them. This was done during a training session, the purpose of which was to advise the team as to what the law requires and what ought therefore to be done in a relevant legal context – specifically, in the lawful performance of their ECF casework functions. There was no other purpose.
 - d. This training was delivered by way of a lecture with PowerPoint slides on 15 February 2014. The slides contained counsel’s advice on the application of Section 10 of LASPO and how caseworkers should apply the ECF regime to the applications they process.

- e. The witness knew that the LAA, including the officers who attended the training, as well as the external counsel involved, fully understood that this advice was being imparted confidentially in the context of a lawyer-client relationship. The LAA considered the contents of this training session to be privileged, then and now.
 - f. It is very important that the LAA and its caseworkers should continue to be able to receive such advice on a confidential basis. Disclosure of the disputed information in this case would undermine that confidentiality of lawyer-client communications.
 - g. The advice contained in the slides is not 'stale' in the sense that the ECF scheme itself has only been in existence since April 2013 and litigation on the operation of the ECF scheme remains ongoing. The most high profile case is *(R) IS V Director of Legal Aid Casework & The Lord Chancellor [2015] EWHC 1965 (Admin)*, in which permission has been granted to the Director and Lord Chancellor to appeal. Mr Chamberlain QC was retained to represent the Lord Chancellor in that litigation, and remains instructed in the appeal.
24. The MoJ provided a letter of 7 May 2015 from the MoJ to the Commissioner.³ This included:
- a. *"There is ongoing litigation in relation to the [ECF] team, as part of that litigation, 7 lever arch files of material were disclosed...The withheld information has not been disclosed in the proceedings, on the basis that it attracts legal professional privilege (LPP)..."*
 - b. *The withheld information is a set of training slides...*
 - c. *The LAA's Director ... and Lord Chancellor are currently facing a challenge concerning the operation of the [ECF] scheme which is being heard in the High Court. The LAA have not disclosed the slides in the court proceedings, on the basis that they attract LPP, and have sought an independent second opinion from counsel on the question whether to waive privilege in these materials. Counsel advised that the LAA should not waive privilege ...and the LAA continue to maintain that the withheld information is subject to LPP.*
 - d. *Following a case management hearing in these proceedings on 15 April 2015, leading counsel, on behalf of the Director, accepted the judge's invitation to waive privilege in respect of some of the materials (including the slides referred to above) for which LPP had been claimed....The Director is not prepared to waive privilege over passages in any documents which reveal the nature of advice given by a professional lawyer to their clients about how they should undertake a particular task or what to do in a particular set of facts or in relation to ongoing litigation....*
 - e. *Applying these principles, in respect of the slides... There were three parts to this presentation...privilege is waived in respect of the first part but maintained in respect of the second and third parts. This*

³ See page 109 of Open Bundle.

waiver is strictly for the purposes of the litigation on the basis that the material will not be disseminated wider than the claimant's legal team. In respect of the FOI request, which is disclosure to the world at large, the LAA maintain that s42 applies to the slides in respect of the complainants FOIA request. The information, on what the Director may or may not be willing to waive privilege on, is provided for the context in the litigation against which the FOI request is set ... “

Issue 1. Legal professional privilege

25. The MoJ's submissions included the following:

- a. The slides were commissioned by the Director of Legal Aid Casework at the LAA from external leading and junior Counsel. The slides contained their professional advice on how the LAA should apply the ECF regime, within the context of a lawyer-client relationship. They were the documentary basis for an oral presentation given by Counsel to LAA lawyers and caseworkers.
- b. They were confidential. For example, Counsel would not be free to disclose the information contained in those slides to persons outside the LAA.
- c. Whilst training materials on legal subjects will not without more attract LAP, the fact that the information was a document used to deliver a training session did not prevent it from attracting LAP. It was not merely a training session in the ordinary sense of that term. It was a session in which LAA caseworkers were advised by external counsel on how best to discharge their legal duties in respect of ECF applications. The disputed information was clearly the professional input of external counsel to their clients about what should lawfully and prudently be done when dealing with ECF applications.
- d. The witness explained that in this case:
 - i. The lawyers imparted the disputed information to the LAA on instruction, as part of their lawyer-client relationship;
 - ii. The disputed information contains their advice on how the ECF regime should be applied;
 - iii. The purpose of the training session was for them to impart this advice to their client, the LAA;
 - iv. The disputed information reflects what was imparted at that session;
 - v. The disputed information was and remains confidential.
- e. The Counsel remains retained to appear in litigation concerning the ECF regime.⁴

26. The Commissioner's submissions included the following:

⁴ It was not clear why paragraph 25(e) was of the relevance, given that the MoJ were not relying on litigation privilege, such that this point is not considered further.

- a. LAP covers a narrow range of information, namely confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice. Whether or not it applied to the withheld was a question of fact, requiring consideration of the relevant information in context.
- b. While it represented communications between a client and their legal advisor acting in a professional capacity, it did not appear to have been produced for the dominant purpose of providing legal advice. The primary motivation (as reflected in the nature of the information itself) was to provide generic training for caseworkers in how to determine applications for exceptional case funding. Therefore it was not produced *"in connection with the provision of legal advice"*.
- c. The Commissioner notes that it does not maintain that the information loses any status as advice solely by virtue of being included or disseminated in training materials.

Our Finding

27. We consider that the withheld material falls within s42(1) FOIA as being information in respect of which a claim of LAP could be maintained in legal proceedings. This is because:
 - a. We have considered the withheld information closely. The material includes advice relating to the obligations of the LAA under public law.
 - b. We are satisfied from reviewing the material that it was imparted by Counsel to its client within the LAA. We accept the Appellant's reasoning as to there having been a relationship of confidence in this situation, as is usual between lawyer and client. There was a legal context, inasmuch as LAA caseworkers were being advised by external Counsel as to what the law requires and on how best to discharge their legal duties in respect of ECF applications.
 - c. Taking into account the policy behind LAP (as set out in 'The Law' section above), it seems reasonable to expect the privilege to apply where Counsel was providing materials as the basis for the presentation and would need to be able to do so in an environment of not holding back in the imparting what would be prudent and sensible.
 - d. Where the Commissioner argues that the primary purpose was generic training rather than advice, we are not persuaded that training does not include advising in this instance. We note in particular, that 'advice' includes telling the client the law, and may also include what should prudently and sensibly be done in the relevant legal context.⁵
 - e. If there is any implication from the Commissioner that 'generic training' - where Counsel made a presentation to a team rather than a few individuals - would necessarily mean that the information imparted was not advice, we have seen nothing to persuade us that this was so.

⁵ See paragraph 18 above.

- f. The Second Respondent has made the point that a public authority could exempt itself from almost any request for information by using the services of Counsel or a solicitor to provide advice. We would note that in developing the doctrine, the Courts were mindful to ensure this was not so.⁶ The issue of whether the material falls to be covered by LAP clearly requires proper consideration of what LAP is⁷; with it being a question of fact as to whether a claim of LAP could be maintained in legal proceedings in relation to the particular material in question.

Issue 2: Public Interest

28. The MoJ's submissions included the following:

- a. There was strong inherent weight in maintaining section 42(1) FOIA such that strong countervailing factors are required before disclosure of the disputed information could be ordered.
- b. Disclosure of the disputed information would make no meaningful contribution at all to any public debate there may be about the operation of the legal aid system.
- c. It would contribute to the debate about its approach to ECF applications. However this debate was already being pursued in litigation directly concerned with the ECF regime, which was an authoritative forum at the time of the request.
- d. The public interest in maintaining the confidential nature of legally privileged information is very substantially strengthened where there is ongoing litigation about the very issues with which the privileged information is concerned.
- e. The LAA needs a confidential space in which to obtain external legal input on how best to apply complex statutory provisions and to impart that confidential input to its caseworkers. Disclosure of the disputed information would destroy that confidential space in this particular case and would seriously undermine it in future cases. If the LAA is unable to withhold privileged information even where there was live litigation afoot on a contentious issue, the MoJ questioned how it could be confident in the integrity of that confidential lawyer-client space in future cases.

29. The Commissioner's submitted that the issue of how the legal aid system operated, including with respect to eligibility for ECF, was a matter of some debate. Therefore, had the exemption been engaged, the public interest would favour disclosure.

Our Findings

30. We find the relevant public interests in maintaining the exemption are:

- a. A strong inherent interest in maintaining LAP so as to encourage full and frank communication between lawyer and client and thereby

⁶ See for instance Lord Taylor's comments set out in paragraph 18 above.

⁷ See paragraphs 15 to 19 above.

promote broader public interests in the observance of law and administration of justice; and to allow a 'safe space' for the client not to hold back from speaking what is on his/her mind and or the truth. As stated by the MoJ, it needs to be confident in the integrity of the confidential lawyer-client space.

- b. A need for the LAA to have a confidential space in which to obtain external legal input on how best to apply complex statutory provisions and to impart that confidential input to its caseworkers. We accept that disclosing this material would undermine that confidential space in this instance.

31. We find the public interests in disclosing the information are:

- a. As stated by the Commissioner, the issue of how the legal aid system operated, is a matter of some debate and interest.
- b. We did not accept the MoJ's argument that disclosure would make no meaningful contribution at all to any public debate on the legal aid system. Instead, it seemed clear to us that understanding the LAA's approach to ECF in deciding what would and would not be covered by legal aid, (namely, what they consider the law requires and on how best to discharge their legal duties in respect of ECF applications), is a strong public interest, as is anything that might help ensure a consistent and fair approach to this.
- c. The material might help applicants for ECF to understand better the ECF's system for considering applications.

32. We consider that public interests in maintaining the exemption outweigh the public interest in disclosing the information because of the paramount importance in ensuring the ECF team has a confidential space in which to obtain external legal input on how best to perform its role. We found that the collective weight of interests indicating withholding the material in paragraph 30 overbalanced those indicating disclosure in paragraph 31.

33. We note that the MoJ referred to the importance of withholding privileged information where there was current related litigation. However, the MoJ was not relying on litigation privilege such that, in the absence of fuller analysis, it was not clear to us what point they were seeking to make. The bundle of documents illustrated that the case pursued in litigation had been considered to be of particular broad public interest, such that it could equally have been argued that the material could potentially improve the understanding of the matter being litigated. To the extent that part of the material was being withheld from disclosure in another Court on the basis of litigation privilege, this was clearly a matter for that Court.

34. Where the MoJ accepted disclosure would contribute to the debate about its approach to ECF applications, it considered that the debate was already being pursued in the litigation mentioned above, which was directly concerned with the ECF regime and an authoritative forum at the time of the request. We did not accept this. Since the litigation is focused on certain areas, there must be other interests beyond the litigation where the requested material could essentially serve as guidance more broadly on how the ECF is applied.

Additionally, any disclosure within litigation would not be the same as disclosure made under FOIA, which is often treated as a disclosure to 'the world at large' when considering the public interest test.

35. Our decision is unanimous.

Judge Taylor

18 March 2016