



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0252

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50572310
Dated: 15 October 2015**

Appellant: NORMAN HUDSON

Respondent: INFORMATION COMMISSIONER

Additional Party: THE WELSH GOVERNMENT

On the papers: 16 MAY 2016

Date of decision: 4 JULY 2016

Date of Promulgation 6 July 2016

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and MALCOLM CLARKE
Tribunal Members

Written representations:

For the Appellant: Mr Norman Hudson

For the Respondent: Ms Zoe Gannon, Counsel instructed on behalf of the
Information Commissioner

For the Additional Party: Ms Lucy Morgan, Solicitor, Welsh Government Legal
Services Department

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: Freedom of Information Act 2000

Qualified Exemptions

- Legal Professional Privilege s.42

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 15 October 2015 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Mr Norman Hudson (the Appellant) wrote to the Welsh Government on 18 November 2014 asking for information under the Freedom of Information Act (FOIA) 2000.
2. The information he was seeking related to a previous FOIA request he had made (Decision Notice FS50538947). The request in this appeal relates to that information and specifically

.... with reference to Paragraph 11 of the Decision Notice, please let me have a copy of the Legal Advice your department now admits to having obtained after my Meeting on 13 November 2013.

3. On 17 November 2014 the Welsh Government responded, confirming that it held the information but refusing to disclose it on the basis of the FOIA exemption in section 42 (1) relating to Legal Professional Privilege. It confirmed this decision to him after an internal review in January 2015.

The complaint to the Information Commissioner

4. In a Decision Notice dated 15 October 2015 the Commissioner held – for reasons set out at Paragraphs 7 – 29 – that the Welsh Government had complied with its obligations under FOIA and could rely on the section 42 (1) exemption.

The appeal to the Tribunal

5. In his appeal to the Tribunal dated 3 November 2015 he complained about the conduct of the Welsh Government and of the Information Commissioner in relation to his request.
6. He relied generally on the “Nolan Principles” applying to individuals occupying public office (including members of the civil service) and the “Rules of Natural Justice”.
7. Specifically, he identified the following elements, summarised below:
 - (1) The decision had the appearance of bias and was unjust.
 - (2) The Welsh Government had been dishonest in its dealings with the Commissioner specifically because of one Welsh Government employee’s breach of the Nolan “honesty” Principle.
 - (3) The legal advice had not maintained its confidential status.
 - (4) The Appellant had not been provided with an opportunity to scrutinise the Welsh Government’s evidence.
 - (5) The information had been obtained for purposes other than the provision of legal advice and should not have been protected by LPP.
8. The Appellant set out a series of outcomes he was seeking from this appeal. These were:
 - (1) An order that the Welsh for Adults Centres refund fees to all those taught by tutors not specifically qualified to teach Welsh.

(2) That Awen Penri be held account for her “flagrant breach” of the Nolan “Honesty” Principle.

(3) That the Commissioner reviewed his decision notice taking into account the number of individuals taught by non-qualified teachers and the amount of fees paid by those individuals once he had ascertained such figures.

9. It should be noted here that fulfilling the outcomes in Paragraph 8 above are not within the statutory remit of the Information Rights Tribunal.

The questions for the Tribunal

10. Has the exemption in section 42 (1) of FOIA been correctly applied to the information requested on the basis that it engaged and fulfilled the requirements to protect Legal Professional Privilege?

Evidence

11. The Tribunal has considered the open and withheld information itself and adopted the guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure set out immediately below.

12. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

13. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

14. The closed bundle in this appeal contained the information on which the exemption at section 42 (1) was claimed. It was necessary for the Tribunal to see this and consider it, when set against the Open material, before reaching its conclusions.

15. The Tribunal has considered carefully and rigorously the material in the light of the Appellant's points and concerns already expressed in the notice of appeal. It has been able to scrutinise it to assess whether the exemption has been fairly and lawfully claimed.

16. The Tribunal has not felt it necessary to use a Closed Annex for its reasoning in this appeal because the reasons themselves are on the face of its Open decision.

17. To satisfy itself that the Welsh Government had approached the application of the exemption correctly the Tribunal on 23 May 2016, after initially considering the all the material in this appeal, directed the Welsh Government:

- (1) Provide to the Tribunal a copy of the relevant policy that was in force at the time of the request.
- (2) Provide a copy of the link to the Welsh Government Code of Practice.
- (3) Indicate whether the Appellant has ever been told that, in the view of the Welsh Government having taken legal advice, he was mistaken about the correct interpretation of the term "relevant course" in the Regulations.

18. On 27 May 2016 the Welsh Government complied with that Direction in respect of all three points. In respect of the third one, it replied:

Following receipt of legal advice, the WG can confirm that the Appellant was not told that he was mistaken about the interpretation of the term "relevant course" in the 2002 Regulations. However, policy officials only sought advice from the WG's Legal Services Department in order to satisfy themselves that they were interpreting the 2002 Regulations correctly. The content of the legal advice did not contradict any of the views expressed by officials at the meeting on 13 November 2013.

19. If, having read the advice, the Tribunal had found evidence that the Welsh Government was misleading the public on the legal position this would have altered the public interest test balance but this was not the case.

Conclusion and remedy

20. The Tribunal reminded itself that the exemption within section 42 is not an absolute one but is qualified. The exemption can be overridden if, on balance, the public interest in its disclosure outweighs the public interest in the maintenance of the exemption.
21. Legal Professional Privilege has two aspects: firstly there is legal advice privilege and secondly there is litigation privilege.
22. The advice at the heart of this appeal relates to legal advice privilege. That is concerned with confidential communications between a lawyer (who can include an in-house lawyer) and the client (in this case the Welsh Government) for the purpose of giving or receiving legal advice in both litigation and non-litigation scenarios.
23. The privilege in this appeal belongs to the Welsh Government.
24. The case law of the Information Rights Tribunal makes it clear that confidentiality in the information in question is not lost simply because there has been limited disclosure to individual parties or limited public references to privileged material for instance by way of a brief summary in a public report or on a website.
25. The public interest in being able to receive “disinterested and frank legal advice” in order to assist public authorities like the Welsh Government in making appropriate decisions exists – particularly in this case – to allow those giving it to do so “unfettered by concerns about disclosure”.
26. That formulation comes from the leading Tribunal case of *Bellamy v IC and DTT* from April 2006 and it has been followed in a long line of cases. The High Court subsequently endorsed it as the correct approach in *DBERR v O’Brien and IC* [2009] EWHC 164 (QB) at [48].

27. The Tribunal finds that the information in question was created by an in-house lawyer at the Welsh Government and was provided to policy officials employed by the Welsh Government. This is clearly within the boundaries of a client/lawyer relationship.

28. Looking at the withheld information it is clear to the Tribunal that it is legal advice. It was provided by the in-house lawyer for the policy officials in the Welsh Government who were responsible for the Welsh Government's Welsh for Adults.

29. It concerns the interpretation of the Further Education Teachers' Qualifications (Wales) Regulations 2002. The advice relates to Regulations that are still in force and which the Welsh Government must comply with.

30. The advice itself was obtained in relation to a complaint made by the Appellant himself and the Appellant continues actively to pursue that complaint.

31. The Welsh Government's information to the Commissioner on 10 July 2015 was that:

The advice has retained its confidential status. It has not been distributed within the Welsh Government on an unrestricted basis or shared with any third parties outside the organisation.

32. The Appellant has provided no evidence that undermines this position.

33. Having considered the information in question, the Tribunal agrees that the balancing exercise in terms of the public interest was conducted correctly. Namely:

(1) There is a strong public interest in public authorities providing full and frank information to their legal advisers and receiving full and

frank advice without fear that the information or advice in question will be disclosed without their permission. This protects the present information and also ensures that public authorities can continue to seek full and frank legal advice in the future.

(2) The disclosure of the legal advice in respect of the interpretation of the Regulation could prejudice the Welsh Government's ability to defend its legal interests and unfairly expose it to challenge.

(3) While there is a public interest in transparency and accountability, because this allows individuals to enhance their understanding of the reasons for decisions taken by any public body, there is no evidence provided by the Appellant that any of the potential countervailing reasons to dis-apply the exemption are present in this appeal.

34. In dismissing the Appellant's appeal, the Tribunal notes that, practically, it would have made sense for the Welsh Government, following receipt of the legal advice, to tell the Appellant that he was mistaken about the interpretation of the term "relevant course" in the 2002 Regulations and explain why.

35. Our decision is unanimous.

36. There is no order as to costs.

Robin Callender Smith

Judge

4 July 2016