First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0121

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Anne Chafer
and
Rosalind Tatam

Heard at Field House on 6 September 2019

Between

Liam O'Hanlon

Appellant

and

The Information Commissioner

Respondent

The Appellant represented himself

The Respondent was represented by Mr Mitchell

DECISION AND REASONS

Background

1. In the background to this appeal are a series of previous complaints and appeals brought by the Appellant. The request for information we are concerned with was made to the Information Commissioner's Office itself. In this decision 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the Information Commissioner dealing with the subsequent complaint and responding to this appeal.

2. It is sensible to set out some of that background before turning to the request which is subject to the current appeal.

3. The narrative up to the request we are concerned with was summarised by the Upper Tribunal (UT)in an appeal brought by the Appellant and decided on 29 January 2019: *O'Hanlon v Information Commissioner* [2019] UKUT 34 (AAC).

4. The UT Judge Jacob said as follows:-

> This case is a classic example of how one thing can lead to another. It began with a visit by Mr O'Hanlon and a friend to see a neighbour who was terminally ill in hospital. There was a disagreement with the nurses whether or not to call a doctor. This has led to the following:
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> - A complaint to the NHS Trust responsible for the hospital.
> - A further complaint to the Trust about the handling of the first complaint.
> - A complaint to the Ombudsman about the way the Trust had dealt with the complaints.
> - A request to the Trust under the Freedom of Information Act 2000 (FOIA from now on). This came before the Information Commissioner on complaint, and then before the First-tier Tribunal on appeal, which was disposed of by consent.
> - A further request to the Trust under FOIA. This came before the Commissioner on complaint (FS50552668)

and then before the First-tier Tribunal on appeal (EA/2015/0120). I am going to call this 'the 2015 appeal.' Upper Tribunal Judge Markus refused Mr O'Hanlon permission to appeal against the tribunal's decision (*GIA/2145/2016*).

- A request to the Commissioner as a public authority under FOIA. Following the Commissioner's reply, the matter came before the Commissioner on complaint (FS50676914) and then before the First-tier Tribunal on appeal (EA/2017/0232). This case is an appeal, brought with my permission, against the tribunal's decision.

5. A little more detail is needed in relation to what UTJ Jacob called 'the 2015 appeal'. In that appeal the Appellant sought information from an NHS Trust (the Trust) about its investigation of a complaint made by the Appellant. The Trust relied on the exemption in section 36(2) FOIA which requires an opinion from a qualified person (QP) before a public authority can claim that disclosure would (or would be likely to) inhibit the free and frank exchange of views for the purposes of deliberation. One of the Appellant's grounds of appeal was that the Director of Nursing for the Trust who had purported to be the QP, as the role had been 'delegated' to her (while the actual QP was away), should not have performed that role, and the Commissioner's guidance stated in terms that such delegation of the role was not permitted. The Commissioner submitted that the guidance was not an accurate reflection of the law, but also lodged a pleading stating that in any event a further QP's opinion (this time from the Chief Executive) had been filed. The Trust also filed a response which stated that, in fact, the second QP's opinion had been obtained at the request of the Commissioner, in order to corroborate the initial opinion. The Commissioner filed a further submission stating that it was intended to revise the guidance. All these steps took place between July and December 2015.

6. The first-tier tribunal (FTT) heard the 2015 appeal on 9 March 2016 and gave

its decision on 30 April 2016. The FTT decided that the Chief Executive's opinion had been valid and reasonable for the purposes of s36(2) FOIA , and so there was no need to decide on the reasonableness of the Director of Nursing opinion. There was an appeal to the UT by the Appellant, where on 4 May 2016 UTJ Markus rejected the argument that the FTT should not have relied on the second QP opinion, finding that it supported an exemption the Trust had always relied upon.

7. The Appellant then decided to request information from the ICO about the process of revising the guidance and any subsequent revisions. That request led to an appeal in 2017 (the 2017 appeal) and an FTT decision of 1 May 2018 in case number EA/2017/0232. Legal professional privilege (LPP) and the exemption under s42 FOIA was claimed by the ICO in that case. One of the Appellant's arguments was that, as it was accepted that the guidance referred to in the 2015 appeal had not been amended, then that previous FTT had been misled and the ICO was not entitled to rely on LPP or s42 FOIA. The Appellant also complained about the fact that the Commissioner had initiated the production of the second QP opinion in the 2015 appeal. The Commissioner claimed that it was still intended to amend the guidance.

8. The FTT, having seen the withheld material, explained at paragraph 62 of the decision that the withheld documents 'do recognize that the guidance would have to be revised' and that in the 2015 appeal counsel and solicitor had acted 'beyond reproach' as they 'had clear instructions that the guidance would be revised'. The FTT decided that the 2015 Appeal tribunal had not been misled.

9. However, the FTT in 2017 appeal was concerned about one aspect of the Commissioner's approach to the 2015 Appeal. This was the fact, as mentioned above, that the Commissioner had suggested to the Trust that a second QP opinion be obtained, shortly after the Appellant had queried the validity of the first QP opinion. The FTT hearing the 2017 appeal thought that the

suggestion by the Commissioner that the Trust should create 'a new factual scenario' by obtaining the new QP opinion was going beyond the Commissioner's 'usual disinterested role', and that it was 'not surprising' that the Appellant felt that 'the Commissioner was entering the arena and, in his words adopting a win at all costs approach' (see paragraph 82 of the decision). In the end the FTT decided that the Commissioner's 'conduct' did not 'tip the public interest scales' for deciding whether there should be disclosure despite the engagement of the s42 FOIA exemption for LPP.

10. The Appellant appealed the decision by the FTT that most of the withheld material would remain withheld, and this brings us to the UT decision referred to at the start of this decision. After rehearsing the background UTJ Jacob found that the FTT had made a finding that there was a settled intention by the Commissioner to revise the guidance (the Appellant had argued otherwise). In relation to the relevance of the Commissioner's conduct in the 2015 appeal to the public interest balance, UTJ Jacob said:-

> 14. Mr O'Hanlon also argued that the Commissioner's conduct in the 2015 appeal either prevented the Commissioner from relying on legal advice privilege or should mean that the public interests balance was in his favour. He said that the Commissioner's approach amounted to a personal attack on him and that he was being accused of being dishonest. The tribunal made its view clear on what the Commissioner had done; it was less than approving. I might have been more generous to the Commissioner. I can see the sense in saying to a public authority that its approach had been defective, but it would be more efficient to remedy it while the case was before the Commissioner. That would avoid the need for the Commissioner to remit the case to the public authority, only for it to come back to the Commissioner when the proper approach had been followed. Be that as it may, I will deal with the case on the basis of the tribunal's view, which was favourable to Mr O'Hanlon. On that basis, I can see no error of law in the tribunal's approach, either as regards privilege or the balance of public interests.

11. UTJ Jacob found that the FTT had taken into account the Commissioner's conduct and given it proper weight in the public interest balancing exercise.

<u>This request</u>

12. The Appellant decided to pursue issues that had arisen in these previous complaints and appeals. On 29 May 2018 he wrote to the ICO and requested information in the following terms:

> "This is a request to the Information Commissioner's Office (the ICO) for information held in its role as a public authority within the meaning of the Freedom of Information Act, Schedule 1. The Request arises out of the conduct of two information tribunal cases EA/2015/0120 and 2017/0232. You have just provided some information ordered by the latter tribunal on 2 May 2018. The scope of each discrete part of this request is as follows, and I ask that each be given individual attention, as is my entitlement under section 1.
>
> 1. Information amounting to the text of correspondence between the ICO and Barnet Enfield and Haringey Mental Health NHS Trust (MHT) [or vice versa; and including legal or other representatives of either] leading on 31 July 2015 to the signing by the MHT chief executive Maria Kane of 2 ICO Qualified Person Opinion forms whose receipt was first pleaded on behalf of the ICO on 29.09.15 in information tribunal case EA/ 2015/0120; and correspondence submitting such forms to the ICO; and any ICO response to MHT.
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> 2. Information evidencing any <u>internal</u> ICO deliberations or any discussion or decision leading up to contact made by the ICO with MHT (believed to have occurred on 24.07.15) and/or to any ICO assessment of said 31 July 2015 opinion forms or opinions stated therein; and information evidencing any internal ICO deliberations or any discussion or decision leading up to the pleading by the ICO on 29.09.15 that such opinions of the MHT chief executive were reasonable.
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> 3. Information amounting to the text of correspondence between the ICO and MHT [or vice versa; and including legal or other representatives of either] leading on 19 and then on 27 August

2014 to the signing by MHT's self-described acting chief executive Mary Sexton of 2 ICO Qualified Person Opinion forms; and correspondence submitting same to the ICO; and any ICO response to MHT.

4. Information evidencing any internal ICO deliberations or any discussion or decision leading up to contact made by the ICO with MHT and/or to any ICO assessment of said 19 or 27 August 2014 opinion forms or opinions stated therein; and information evidencing any internal ICO deliberations or any discussion or decision leading up to (a) a statutory finding under section 50 that either of such opinions was reasonable; or (b) the pleading by the ICO on 09.07.15 that such opinions of Mary Sexton were reasonable.

5. Information concerning any monitoring or enforcement by the ICO of MHT's compliance with the FOI Act since 31.10.13.

6. Information relating to the ICO's procedures for and/or method of raising, drafting, producing, consulting, approving, revising or amending its guidance to public authorities, including that provided for by section 47 FOIA; to include the granting to any ICO personnel of delegated authority to do such under the Data Protection Act Schedule 5, whether individually or within a team or group structure.

7. Information as to any decision made within the ICO and/or by its representatives in the period 30.11 15 to 09.12.15 to concede that the guidance would be revised; and/or to present such a concession by pleading on 09.12.15 that the Commissioner intends to revise. [The words in italics above are from [Redacted] e-mail of 16.05.16 to Information Tribunal Decisions at 18:05 just provided by you by order of the Tribunal on 29 May 2018 at 12:10.]"

13. The ICO responded on 20 July 2018 to say that it did not hold information with the scope of parts 2, 3, 4 and 5 of the request. The ICO confirmed it held information within the scope of parts 1, 6 and 7 and released the information it held that fell within the scope of part 6.

14. However, the ICO said the information it held within the scope of parts 1 and 7 of the request was exempt from release under section 42(1) FOIA as it attracted legal professional privilege, and that the public interest was in

favour of maintaining the exemption. There was a review on 10 August 2018 where the ICO maintained its position.

15. The Appellant complained to the Commissioner on 13 August 2018. Paragraph 11 of the decision notice dated 14 March 2019 states that the investigation had focused on the ICO's application of section 42(1) FOIA to information it withheld that relates to parts 1 and 7 of the request.

16. In another twist to the tale, which has some relevance to this appeal, the Appellant made a request to the Trust for information and it appears that some of the documents withheld by the ICO in our case have been disclosed to the Appellant by the Trust on 21 August 2018, and indeed redacted versions are in the bundles for this appeal. The Commissioner explains that:-

> 8. In correspondence to the Commissioner on 22 August 2018 the complainant advised that, separately, he had just received redacted information from Barnet, Enfield and Haringey Mental Health NHS Trust ('the Trust'), the majority of which comprised redacted emails between the Trust and the ICO covering the period 14 July 2015 to 6 August 2015. The complainant said this was information that the ICO had withheld from him in response to the current request.

The law

17. Section 42 FOIA states that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt information. However, this is a qualified exemption which means that in addition to demonstrating that the requested information falls within the definition of the exemption, there must be consideration of the public interest arguments for and against disclosure to demonstrate in a given case that the public interest rests in maintaining the exemption or disclosing the information. Section 42(1)(a) FOIA reads, materially, as follows:-

> **42.— Legal professional privilege.**

> (1) Information in respect of which a claim to legal professional privilege… could be maintained in legal proceedings is exempt information.

18. We will discuss further the nature of LPP later in this decision. However, in relation to the application of the public interest test in s42 FOIA cases it is worth noting here that in *DBERR v O'Brien v IC* [2009] EWHC 164 QB, Wyn Williams J gave the following guidance:

> 41. … it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA . Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

> 53…..Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

<u>The Decision Notice</u>

19. The Commissioner started by considering the material that fell within part 1 of the request and stated that:-

> 16….the information the ICO holds is correspondence exchanged between lawyers representing the ICO and the Trust. The ICO says this was correspondence exchanged between the two parties in advance of litigation: specifically, the First Tier Tribunal

(Information Rights)('the FTT') appeal case EA/2015/0120. The correspondence was, according to the ICO, produced by lawyers for the exclusive purpose of conducting litigation ie for the above appeal.

20. The Commissioner said that she had examined the material and found that it was as the ICO had described.

21. The Commissioner discussed the fact that the Trust had provided the Appellant with certain information which would fall within the scope of part 1 as the 'possibility therefore existed that this particular information might no longer attract LPP as it had now been made available to the general public' (by being disclosed to the Appellant through a FOIA request).

22. However, the Commissioner noted that the position had to be assessed at the time the ICO had considered the request on 29 May 2018 (or at the time of the review on 10 August 2018), and further noted that the Trust had released the information to the Appellant on 21 August 2018. Thus, at the relevant times, the latest being 10 August 2018, the Commissioner was satisfied that all the information within part 1 attracted LPP, that privilege had not been waived and the s42(1) FOIA exemption applied.

23. In relation to part 7 (information associated with any decision to revise particular guidance, made by the ICO between specific dates), the Commissioner described the actual information as 'correspondence exchanged between its in-house lawyer, her internal client and the external counsel instructed in relation to the [2015 appeal], between 30 November 2015 and 9 December 2015.' The ICO told the Commissioner that the information was created in anticipation of the 2015 appeal and the response to the appeal, and the sole purpose of the communications was to obtain advice to assist the litigation. It was between legal advisers and their client solely for the purpose of preparation, and the correspondence was confidential and had not been

made available to the public or third party without restriction. The Commissioner agreed with this description and found that the s42(1) FOIA exemption applied at the time of the request.

24. The Commissioner deals briefly with the competing public interest considerations which need to be taken into account. In favour of disclosure, the Commissioner says there are general issues of transparency and openness. Against, is the general public interest underpinning the principle of LPP.

25. The Commissioner notes that although the requested material dates back to 2015, the matter is still 'live' given the ongoing nature of the dispute, further complaints made by the Appellant and the prospect of further litigation, and concludes that the public interest in maintaining the principle of legal privilege far outweighs the public interest in disclosure.

The Appeal

26. The Claimant's appeal is dated 8 April 2019. He makes a series of points which can perhaps be summarized as follows:-

    (a) Parts 2 -6 of the request have not been addressed by the Commissioner

    (b) LPP should not be applied in the first-tier tribunal in the same way as in civil litigation.

    (c) The Commissioner has not taken account of the comments made in the 2017 appeal about the Commissioner's approach in the 2015 appeal. The Appellant also complains about delay in dealing with his complaint and the fact that he has received a subsequent vexatiousness warning (3 December 2018) in relation to a further request.

(d) The Commissioner is wrong to consider the case as of the date of the request – this is compared to the fluidity of the position in the 2015 Appeal where a later QP opinion was considered.

(e) The public interest test should consider the partisanship of the Commissioner and the fact that material was in the public domain 'long before the section 50 process was begun'.

(f) The Commissioner has ignored the publication of the revised guidance in August 2018.

(g) The Commissioner has not explained her concerns about possible further requests, complaints and appeals.

27. The rest of the appeal document expands on these points, over a number of pages. The Commissioner has produced a response and a skeleton argument which confirms the approach in the decision notice and which address the Appellant's appeal points. The Appellant has responded with lengthy documents:-

    (a) a Reply of 32 pages which repeats many of the points made in the appeal grounds.

    (b) A skeleton argument of 38 pages which, amongst other things, revisits the 2015 appeal and the principles of delegation discussed therein over several pages, and the motivation for the ICO in inviting a second QP opinion. The Appellant also questions the timing of the guidance revision and challenges the ICO's responses to Parts 2-6 of the request. The 'Overview' at the end of the skeleton argument says that 'This Tribunal is in the best position….to express a view as to the morality of the ICO's conduct of the 2015 and 2017 appeals', suggesting that we may disallow any section 42 FOIA exemption claim on the 'moral basis' that the 'ICO's litigators were not attempting to conduct those

appeals with clean hands'. The Appellant would like us to express a view that the revised guidance on s36 FOIA is simply wrong.

(c) An addendum skeleton of nine pages updating on recent developments and submitting that the Appellant had not agreed to a reduction in scope of the case to Parts 1 and 7.

28. It is not possible or proportionate for the Tribunal to set out or address every point that the Appellant has made in almost 80 pages of written submissions (in addition to the appeal document), and the fact that there was an oral hearing was a useful way of seeking to elicit the Appellant's main points.

The hearing

29. The hearing lasted most of a day. The Appellant ably represented himself and the Commissioner was ably represented by Mr Mitchell. There was a short closed hearing where we looked at the withheld material with Mr Mitchell and asked some questions of the Commissioner and then provided a gist to the Appellant as follows:-

1. The Panel asked the follow questions in relation to part 1 of the request:
    a. Whether LPP applied as some of the information did not relate to legal advice
    b. Whether all of the information was confidential
    c. Whether the date and time of the emails suggested they should not be privileged
2. In relation to the first question, the Commissioner submitted that the privilege asserted in relation to part 1 was litigation privilege, which applied whether or not advice was sought.
3. In relation to the second question, the Commissioner made submissions on each of the documents. The Commissioner submitted: (i) the documents were all in the context of responding to the appeal, (ii) they all related to a legal issue that the ICO's solicitor had identified in relation to the existing Qualified Person's Opinion, and (iii) at the time of the correspondence it had not been fully decided how the Commissioner would address this issue in the responding to the appeal.
4. In relation to the third question, the Panel asked whether the time and date of the documents indicated whether it should have been disclosed to the Tribunal. The Commissioner responded that there would likely

have been a time-lag between these documents and the hearing of the appeal.

5. The Tribunal asked whether parts of the documents could have been redacted with the remainder disclosed in response to the request. The Commissioner submitted that it is unlikely that there would have been harm to the Commissioner's interest had this approach been taken but it was within the Commissioner's right to assert privilege over banal matters. The Commissioner submitted that it is not concerning that the Commissioner discussed obtaining a second Qualified Person's Opinion as both opinions would have been in front of the Tribunal.
6. In relation to part 7 of the request, the Panel asked whether LPP applies to this information as some of it was not expressly related to legal issues. The Commissioner submitted that those were in the context of a legal issue and all related to how and whether the Commissioner would deal with that issue.
7. The Panel asked whether these documents had now lost their secrecy, as it was four years since they were created. The Commissioner responded (i) that the relevant time was at the date of the request, (ii) the issues were live at the date of the request, and (iii) that there is inherent weight in the principle of LPP which can be applied even when material becomes banal.

30. A main point made by the Appellant, re-iterated on a number of occasions during the hearing was that LPP and the s42 FOIA exemption should not apply to the withheld information because the Commissioner had misled the 2015 appeal about the genesis of the second QP opinion; or that, if the s42 FOIA exemption does apply, then when considering the public interest balance such conduct should mean that the balance is in favour of disclosure. In addition, the Appellant claimed that Commissioner had misled the 2015 Appeal because it had no intention of revising the guidance at the time and had only done so in 2018 as a way of assuaging the Appellant's continued focus on the issue.

31. The Appellant was also keen to press his point that proceedings before this tribunal were not adversarial and therefore LPP should not apply in any event.

32. The Appellant pursued his argument that it was unfair that for the purposes of this appeal the Tribunal had to consider the matter as of the date of the

request (or the response to it), but that when it came to considering the 2015 appeal the Commissioner was able to rely on the later commission of a second QP's opinion.

33. Finally, the Appellant was anxious to pursue the issue of Parts 2-6 of his request, and the ICO's response that information was not held, even though this was not addressed in the decision notice (which focused on the s42 FOIA issue).

Discussion and decision

Legal professional privilege

34. We agree with the Commissioner's submission that the application of the s.42(1) FOIA is straightforward in this case, for the reasons set out in the decision notice. The ICO relied on litigation privilege which attaches to confidential correspondence between clients, lawyers and third parties (including other parties to litigation), where litigation is contemplated, and where the communications are for the dominant purpose of litigation.

35. Having considered the withheld documents we agree that that description applies to the information within Part 1 and Part 7 of the request as also concluded by the Commissioner (see above at paragraphs 19-23).

36. However, the Appellant says that there are other reasons why LPP should not apply.

37. The first reason relates to the Commissioner's conduct as perceived by the Appellant. The Appellant draws sustenance for his argument in relation to the part 1 material from the comments (summarized above) made by the FTT in the 2017 appeal about the Commissioner's conduct in the 2015 Appeal. It is true that the FTT in the 2017 appeal decision criticised the Commissioner for appearing to descend into the arena and departing from her usual disinterested approach by asking the Trust to obtain the second QP report.

38. But is also true that that is not the only interpretation of the Commissioner's actions. As UTJ Jacob commented (the full paragraph is set out above):-

> …..I can see the sense in saying to a public authority that its approach had been defective, but it would be more efficient to remedy it while the case was before the Commissioner. That would avoid the need for the Commissioner to remit the case to the public authority, only for it to come back to the Commissioner when the proper approach had been followed.

39. In our view, this is the better way to approach the actions of the Commissioner in 2015. It appears that the Commissioner was attempting to deal with the case efficiently and to ensure that the correct exemptions were properly applied, as they should be under the FOIA, rather than adopting a 'win at all costs' approach as alleged by the Appellant. (In fact, it seems that the case was before the Tribunal when the Commissioner took action, but the intention to put things right at the time, rather than require a further decision would be the same). We accept that there might be a problem of perception in adopting the approach outlined by UTJ Jacob (and the 2017 appeal FTT certainly thought so), but in our view it is not dishonest or biased for the Commissioner to act in this way.

40. The simple fact is that a second QP opinion was presented to the 2015 Tribunal as there were doubts about the validity of the first QP opinion, this was accepted by the 2015 appeal, and UTJ Markus upheld that decision (albeit on a different basis). As counsel for the Commissioner submitted, in those circumstances, it did not really matter how the second QP opinion came about.

41. In relation to the part 7 material, the Appellant's main point appeared to be that it was misleading for the Commissioner to say in the 2015 Appeal that there was an intention to amend the guidance, because it

was clear that the guidance was only revised in August 2018 following sustained action from the Appellant. But in our view that is reading too much into the delay. The 2018 appeal accepted in May 2018 (as did the UT) that there was a continued intention to revise, and this then happened shortly afterwards.

42. It is true that there is an exemption from LPP where communications are in furtherance of a crime or fraud as these are not communications within the ordinary scope of the professional lawyer-client relationship and so are not privileged. But even adopting the 2017 appeal FTT's approach, there is nothing even close to crime or fraud in the Commissioner's conduct to justify a loss of LPP for the withheld material on that basis. That is the extent of what we have to decide on this issue.

43. Secondly, the Appellant argues that proceedings before the FTT are not adversarial and therefore the application of LPP is not appropriate in any event. He cites a case called *R (SSHD) v First-Tier Tribunal (IAC)* [2018] UKUT 243 IAC, where there was an unsuccessful submission that litigation privilege did not apply in the immigration tribunal where human rights issues were in play. The case does not assist the Appellant as the UT stated in general terms at paragraph 47 that:-

> 45. There is no disagreement between the parties that for litigation privilege to arise in respect of a communication, it must have been made in contemplation of adversarial litigation. It is evident from the cases to which we were taken that it does not arise in the context of an inquiry (as in Three Rivers (No. 5) and (No.6)), or in disputes as to child care and wardship – see <u>Re L</u>
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> 47. The nature of proceedings before the First-tier Tribunal is different from wardship or child care proceedings. There are two opposing sides; there are areas of factual and legal dispute between the parties; the issues in dispute are identified. Generally, the FtT cannot go behind concessions by either party.

44. The UT then went on to consider whether asylum and human rights FTT appeals are adversarial, despite this general rule, and found that they were. Simply because human rights had to be respected 'there is nothing to demonstrate that this cannot be achieved within the context of proceedings in which there is an identified dispute between the parties' (paragraph 48).

45. Although the UT did not consider the particular case of the information rights tribunal, it seems to us that in a case such as the present there 'are two opposing sides; there are areas of factual and legal dispute between the parties; the issues in dispute are identified' and that means that these proceedings are adversarial. That is the case even in the case where the Commissioner is the regulator enforcing the FOIA, who then becomes a party to proceedings (and is called 'the respondent') when there is an appeal of a decision notice.

Date of consideration

46. The case law relied upon by the Commissioner states that the consideration in the decision notice and by the Tribunal should look at the circumstances at the time of the response to the request. The Commissioner cites the cases of *APPGER v Information Commissioner* [2015] UKUT 377 which applied the approach in *R(Evans) v Attorney General* [2015] UKSC 21. Thus in the *APPGER* case the UT explained that:-

> 52. …the judgment of the Supreme Court confirms and powerfully supports the view that taken as a whole, the language of the statutory scheme indicates that the Commissioner (and the FTT) is charged with assessing past compliance with FOIA, not with monitoring ongoing compliance. That scheme is that a request is made to a public authority and a natural and sensible reading of the language of the provisions relating the application that can be made to the Commissioner and then an appeal of his decisions (see sections 50, 57 and 58) is that they relate to how the public authority

dealt with the request and then to whether the Commissioner erred in law on that issue.

47. The Appellant makes the point that in the 2015 appeal the Trust was permitted to reply on a second QP opinion which was produced after the Trust's decision on disclosure was made, and that it is unfair that he is now restricted to looking at the circumstances in this appeal as at the date when the ICO dealt with his request. However, it is not our role to comment on the way in which the 2015 Appeal tribunal dealt with the issue (or how the UT dealt with it on appeal). All we can do is to apply the binding case law that tells us that this appeal relates 'to how the public authority dealt with the request and then to whether the Commissioner erred in law on that issue'. Thus, the latest date relevant for our consideration is 10 August 2018 (the date of the ICO's review), which pre-dates the disclosure of information to the Appellant by the Trust on 21 August 2018. Thus, the fact that the Appellant obtained some of the withheld information from another source after the ICO had dealt with the request is not relevant to our consideration as to whether the exemption in s42(1) FOIA applies, or to the public interest balance we have to consider thereafter.

Public interest

48. As explained above, when considering the public interest test when s42 FOIA and LPP are in play, we must 'give effect to the significant weight to be afforded to the exemption in any event' and we do this. As was recognised in *O'Brien*, for the purposes of this Tribunal this is an 'in-built' public interest which has essentially been pre-established by the common law.

49. Next, we must consider any particular or further factors that could point to non-disclosure. The Commissioner has raised the point that greater weight might be given to non-disclosure if litigation is contemplated. In this case we do think that is a factor to be given some weight: at the time the decision had

been made the Appellant had already had two appeal hearings with further consideration in the UT, focusing on information created in relation to the same general set of facts, and it was reasonable for the Commissioner to consider that further requests would be made.

50. We then must consider any features supporting disclosure. We recognise the underlying public interest in disclosure and openness and we take those into account. There is a public interest in as much information being in the public domain as possible.

51. In our view, although there is some public interest in disclosure, it has not been established that it is public interest of particularly great importance or value. We have rejected the Appellant's submission that the Commissioner has been engaged in misleading or dishonest conduct, and there is no evidence to support such an allegation. Absent any such evidence, and applying the approach in *O'Brien,* we find that the public interest in disclosure, on the facts of this case, falls a long way short of being of equal weight to the 'built-in' public interest of protecting LPP. The public interest is in withholding the material.

Parts 2-6 of the request

52. The Appellant specifically refers in his appeal to the fact that the Commissioner has not dealt with the ICO's response to information request for material in parts 2-6 of the request. In relation to parts 2-5 the ICO said that it did not hold any information. In relation to part 6, information was disclosed but the Appellant's case seems to be that there would be more to disclose.

53. The Commissioner argues that the Appellant agreed that the decision notice could be limited to the consideration of s42 FOIA, but the Appellant does not accept that it is so. The Appellant's complaint to the Commissioner on 13 August 208 started by saying that '…I can find no evidence of any actual search for material said not to have been held as at 29.05.18; not of any

attention given to the retrievability…of material said to have been destroyed'. The correspondence shows that the Commissioner suggested that the 'focus' of the investigation would be on s42(1) FOIA (see letter dated 17 December 2018) but this does not say that other matters are not to be addressed at all, and there is nothing to show that the Appellant expressly agreed to this in his reply. He has now argued in his appeal that he does not accept the ICO's explanation that the material is not held.

54. How should the Tribunal address the issue? As the UT said in paragraph 102 of *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC):-

> '… there is no limitation on the issues which the FTT can address on appeal, and the focus of its task is the duty of the public authority. This means that the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law…'

55. On that basis it is our view that we should consider whether the ICO was correct to say that it did not hold the material in parts 2-5 of the request. We would note that if the Commissioner intends to only address some of the issues raised in a complaint, we think it may be wise for the Commissioner to use more definite words than that it is intended that a decision notice will 'focus' on a certain area, and to ensure that a complainant has specifically agreed to any such proposal.

56. Public authorities are under a general duty to disclose information they hold where it is requested: section 1 FOIA. By s1(1)(a) FOIA any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. By section 1(4) FOIA the information is the information in question held at the time when the request is received, and information itself means information recorded in any form: see section 84 FOIA.

57. When a public authority says that it does not hold the information requested (or any further information), it is necessary to consider the searches made by the public authority and the explanations given as to why the information is not held and decide, on the balance of probabilities, whether the public authority is holding the information requested or not.

58. The Appellant has set out his arguments in writing and orally. He says he thinks it very unlikely that the ICO did not hold the material in Parts 2 to 6. He believes that either the ICO destroyed the information rather then disclose it, or that the information is being concealed. He links these believes to what he considers to be the Commissioner's misconduct in relation to the 2015 appeal and the 2017 appeal.

59. The bundle contains a number of letters where the ICO explains the searches it has made for the material, and that the material has not been found. On 20 July 2108 the ICO told the Appellant that in relation to part 2 'we do not hold internal ICO deliberations that fall with the scope of your request', and that in relation to parts 3 and 4 'we have conducted extensive searches but we have been unable to identify and information that falls in scope of your request'. It is said that the original complaint case that led to the 2015 appeal 'has been deleted from our electronic casework management system in line with our retention schedule'. In response to part 5 it is said that 'we have not undertaken any monitoring or enforcement action regarding the Trust's compliance with the FOIA'. The ICO said that information in relation to part 6 was held and it was attached to that letter. On 27 July 2018 the ICO explained in more depth the retention policy that would have led to the deletion of 2015 appeal documents two years after proceedings came to an end.

60. On review, the ICO Head of Assurance confirmed on 10 August 2018 that she was satisfied that the searches for the information had been 'comprehensive' and that the information was not held.

61. The Commissioner pointed out in the hearing that destruction of the material when a request had been made would be a criminal offence and there is no evidence that this has happened.

62. It seems to us that we can decide this issue on the material before us. There is no evidence that the ICO has destroyed information other than in line with its retention policy before the request was made, and no evidence that it has deliberately concealed information. We cannot think of any reason why such drastic action should have been taken. The Appellant has been keen to emphasise what he sees as dishonesty and unfairness in the case directed at him, but the reality is that there is very little that the ICO has been criticized for in this case. We agree with the Commissioner's oral submissions at the hearing that there is nothing scandalous or embarrassing in the Commissioner's dealing with the Appellant's requests, complaints and appeals, and no reason why the ICO should lie.

63. Having considered the documentation and submissions it is our view that on the balance of probabilities the ICO did not hold the information sought in parts 2-5 of the request, and did not hold any additional information to that disclosed to the Appellant for the purposes of part 6.

Delay and vexatiousness

64. Finally, we should address briefly the Appellant's concerns about the delays in dealing with his request by the ICO, and the issue of a decision that a further request for information has been said to be

vexatious by the ICO. The Appellant sees these issues as further pointers to the ongoing unfair approach towards him by the Commissioner. We note that the decision notice agreed that there had been a breach of the time limits by the ICO. Clearly the ICO should not breach the time limits for responses set out in FOIA. Whether the Appellant's later request is vexatious is something that he can pursue further. For our purposes we do not think that these issues impact on the consideration of the appeal or our decisions.

65. For the reasons set out above, the appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 11 October 2019.