



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50816764**

Appeal Reference: EA/2019/0298

**Heard at Field House, Bream's Buildings, London
On 4 February 2020**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

PIETER DEWAAL & MIKE JONES

Between

LIAM O'HANLON

Appellant

and

INFORMATION COMMISSIONER

First Respondent

Appearances:-

Appellant: In person

First Respondent: did not appear

This appeal to the general regulatory tribunal (information rights) is an appeal against a decision of the Information Commissioner's decision notice arising out of a complaint to her about how her organisation dealt with an information request. In this tribunal decision the term "ICO" is used from paragraph 5 to denote the Information Commissioner responding to this information request and

“Commissioner” the Information Commissioner dealing with this complaint and appeal.

DECISION AND REASONS

1. Mr O’Hanlon visited a hospital in 2013 and following his visit made a complaint, he was dissatisfied with the outcome of the complaint and made a request under FOIA and subsequently complained to the Information Commissioner (the ICO) and subsequently appealed to the tribunal. During the course of that appeal a question arose as to the validity of a Qualified Person’s Opinion (QPO) given under s36 FOIA and a further QPO was given. During the course of those proceedings an indication was given that the ICO intended to revise her Guidance on delegation of the power to give a QPO.

2. On 12 January 2017 he made a request of the ICO concerning progress with respect to the revision of that Guidance. He requested:-

“all information brought into existence since 19 March 2015 and held in respect of the consideration and/or implementation and/or communication of possible or intended revisions to paragraph 13 of the above mentioned Guide,…”

3. The request of 12 January 2017 came before the tribunal which on 2 May 2018 concluded that certain material relating to the revision of the guidance could be withheld on the grounds of the exemption contained in s42(1) legal professional privilege (LPP). That decision was the subject of an appeal to the Upper Tribunal.

4. Since then he has made four further requests for information (29 May 2018, 25 July 018, 3 November 2018 and 14 March 2019) from the ICO on related issues.

5. On 28 August 2018 the ICO published her revised guidance on the s36 exemption. The request of 3 November 2018 relates to the same subject matter as the request of 12 February 2017. The request was for:-

“All information brought into existence since 19 March 2015 and held in respect of the consideration and/or implementation and/or communication of possible or intended revisions to paragraph 13 of the March 2015 Guide; to include those data more specifically enumerated below.

I have used 19 March 2015 as the start date for the FOIA search and confirmation, as my Request of 12 February 2017 was refused in part because of the propinquity of its date to the stated process of revision, said then to be still live as at 10 January 2017.

[There was then a discussion of issues about the guidance in particular guidance issued by the Ministry of Justice on the issue]

I do not seek copies of legal advice or requests for such insofar as that may be privileged. But I do seek to know what case law information (in the public domain) including tribunal precedents may have been cited in requests for, or the provision of, such advice. For the avoidance of doubt I seek information as to how any revision process was governed by the Framework document sent to me in response to my 12 January 2017 Request"

6. The response of the ICO was set out in the Commissioner's decision notice in this case dated 1 August 2019:

"5. The ICO responded on 3 December 2018. It released some information, namely internal communications about amendments made to the ICO's section 36 guidance, and a copy of that guidance. The ICO withheld some information—communications about First Tier Tribunal (FTT) appeals brought by the complainant—under section 42(1) of the FOIA. It said the public interest favoured maintaining the exemption.

6. The ICO provided an internal review on 4 January 2019 in which it maintained its original position "

7. In the letter setting out the result of the internal review the ICO wrote:-

"I should now add that we have now dealt with several requests from you regarding the subject matter of your request (i.e. the revision of section 36) or which broadly relate to this matter. Additionally, this is the second time we have had to withhold the same information from disclosure under section 42 in response to an information request from you. As stated above, our withholding of this information has been broadly vindicated by the appeals tribunal. I must warn you that continued requests for information on these matters or for information we have already considered for disclosure and withheld, will be considered in line with our guidance on vexatious requests under section 14 of the FOI."

8. Mr O'Hanlon complained on 28 January 2019:-

"This is a request for a section 50 decision about the ICO itself. In disregard of a First-tier Tribunal judgement of May 2018 implicitly inviting a further consideration of the public interest in concealing material relating to a stated intention in late 2015 to amend Guidance once such Guidance might in fact be amended, and by action amounting to evidence of improper partisanship affecting a newly repeated ICO claim to section 42 exemption, the ICO has acted in a partisan manner by warning me, a citizen, not to make a request such as that made on three November 2018. I ask that the section 50 caseworker take a special care to investigate as impartially as possible and to make findings of primary fact in relation to each specific sub-request as if the ICO's information access officers responsible for both the section 17 response and the internal review outcome were offices of a potentially cavalier public authority within the meaning of that phrase adopted in the Birkett case.

In the event of the upholding under section 50 of a claim to privilege I ask for a fresh appraisal of the competing public interest to reflect not only the public nature of

amended guidance but also the ICO's legal officer's unilateral decision to present Judge Jacobs (of the Upper Tribunal sitting on 14 January 2019) via an Authorities Bundle with a copy of the amended Guidance but without the preceding ICO material showing precisely why, and when, the amended wording was adopted (and assuming it ever was) officially approved for publication as an authoritative ICO interpretation of section 36 (in late August 18). Please note the failure so far to have addressed the issue of how in the revision process was governed. That applies both to any consideration in late 2015 and to whatever took place in July and August 2018."

9. In considering Mr O'Hanlon's complaint the Commissioner's investigation focussed on the ICO's application of s42(1) to information it has withheld, and the balance of the public interest. She did not consider MoJ guidance as she did not consider it relevant to the investigation.
10. The Commissioner noted that LPP covers communications between lawyers and their clients for the purpose of obtaining legal advice and communications and/or documents created by or for lawyers for the dominant purpose of litigation. She considered the issues covered by the material were "live" as the issue of the ICO's s36 guidance was the subject of Mr O'Hanlon's appeals to the tribunal, and that the Upper Tribunal made its decision with respect to the 2017 request in January 2019. She concluded that the material was still subject to LPP at the time of the request. In weighing the competing public interests between withholding the information on the grounds of LPP and disclosure in assisting public understanding of the issues around the s36 exemption she concluded that the interest in disclosure was "*substantially weaker than the very strong public interest in lawyers and clients being able to talk frankly and openly with each other. For this reason the Commissioner is satisfied that the balance of public interest falls in favour of maintaining the section 42(1) exemption in this case.*"
11. In his grounds of appeal Mr O'Hanlon argued that the decision notice was a result of an investigation by the Commissioner that:-
 - was too narrow in only addressing the s42 exemption and not setting out the terms of the complaint
 - was framed so as to exclude differences between the ICO and the Ministry of Justice
 - excluded consideration of the motivation behind the section 14 warnings as to vexatiousness.
 - treated the LPP as a class-based exemption which was an error in law.
12. In resisting the appeal the Commissioner argued that the tribunal's jurisdiction was limited to determining whether the Commissioner's decision was wrong in law. She submitted that the only valid ground was potentially related to s42 and that Mr O'Hanlon should refine his grounds of appeal.

13. In response Mr O'Hanlon argued that the delegation of s36 powers was unlawful and submitted that a combination of three cases (*Malnick, King and Carltona*) was determinative of the point. He argued therefore that the ICO's lawyers and officials knew that the guidance was incorrect and that in putting it forward the ICO acted improperly. He therefore submitted that LPP did not apply to the material since the behaviour of the Commissioner and her officials was iniquitous.
14. In the hearing Mr O'Hanlon repeated his arguments and asked the tribunal to consider a "continuous transaction of repeated iniquity". He submitted that since the ICO was partisan there could be no privilege. He argued that it was for the ICO to explain her conduct.

Consideration

15. Mr O'Hanlon complained to the Commissioner under s50 FOIA which provides (so far as is relevant):-

(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

....

(3) Where the Commissioner has received an application under this section, he shall either –

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority –

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

16. The requirements for handling requests in Part 1 are:-

- the s1 general right of access,
- the s10 duty to respond within time limits,
- the s11 duty to provide the information in the requested format (as far as reasonably practicable),
- the s16 duty to provide advice and assistance and
- the s17 duty (where appropriate) to provide a refusal notice.

17. These are the matters which in law may be the subject of a complaint to the Commissioner under s50. Mr O'Hanlon's claims of partisan activity by the ICO and requests for specific investigations in his complaint are not matters which may be the subject of a complaint under s50. The Commissioner's case officer correctly decided that of the issues raised by Mr O'Hanlon's complaint the only ones which fell within the scope of s50 were whether the LPP exemption had been properly applied. Similar considerations apply to the tribunal's responsibilities under s58 to consider whether the Commissioner's decision is in accordance with the law. Of the four grounds of appeal (paragraph 11 above) only the final one relating to the IC's application of s42 could be a proper ground of appeal.

18. Although Mr O'Hanlon argues that the law is clear and the function of providing a QPO may not be delegated, whether or not his submission on the proper application of s36 is correct is of no assistance to him in this case. The MoJ and the ICO had historically issued guidance on s36 which was inconsistent. During the course of litigation the validity of a "delegated" QPO was raised, following contact between the Trust responsible for the hospital and the ICO a QPO was produced by an individual clearly entitled to give it. In the light of this Counsel for the ICO indicated a need for consideration of the guidance. Despite Mr O'Hanlon's fervent submissions this tribunal, differently constituted tribunals and the Upper Tribunal which have all heard versions of this argument have been unable to find the sort of iniquity for which Mr O'Hanlon has argued. It may or may not be the case that in law the s36 function can only be discharged by a single person in an organisation, however the documents produced or circulated during the ICO's consideration of the revision of guidance on this issue are still capable of attracting LPP.

19. In her decision notice the Commissioner found that (decision notice paragraph 21):-

"...all the withheld information –the email communications and attachments to those communications –attracts litigation privilege. With regard to the attachments, in her published guidance on section 42, the Commissioner advises that any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. Having reviewed them, the Commissioner considers that the attachments in this case satisfy that criteria. She also finds that at the time of the request the privilege had not been waived, and consequently the Commissioner is satisfied that the ICO correctly applied section 42(1) to the withheld information."

20. In considering the question of the balance of public interest this exchange of documents arose while Mr O'Hanlon was conducting appeals against the ICO in connection with the issues covered by the information. The significant public interest in the maintenance of LPP by protecting communications between a client and lawyer is therefore strong. The public interest in

disclosing the information is highly limited. The tribunal is satisfied that there is no error in law in the decision notice; the balance lies decisively in favour of non-disclosure.

21. The appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date of Decision: 4 March 2020

Date Promulgated: 5 March 2020