First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0189

Decided without a hearing on 27 March 2020

Before

JUDGE BUCKLEY

JEAN NELSON

PAUL TAYLOR

Between

NICHOLAS WHEATLEY

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN

Second Respondent

DECISION

1. For the reasons set out below the appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50778473 of 7 May 2019 which held that the Second Respondent (the PHSO) was entitled to rely on s 40, 42 and 44 of the Freedom of Information Act 2000 (FOIA). The Commissioner did not require the public authority to take any steps.

2. The closed annex will be released in a redacted form after the later of the expiry of the deadline for permission to appeal or the conclusion of any appeal.

Factual background to the appeal

3. The PHSO comprises two offices: the Parliamentary Commissioner for Administration and the Health Service Commissioner for England. The PHSO is the final complaint body for concerns that have not been resolved by the NHS in England and for certain government bodies and public institutions in the United Kingdom.

4. Actions and decisions of the PHSO are subject to judicial review, which might result in the High Court quashing the PHSO's decision. Historically the PHSO had advised complainants that it had no power to itself withdraw or quash a report of a statutory investigation. Part of the reasoning for this view appears to be that the Ombudsman might be 'functus officio' once the report was completed. Functus officio means, in essence that once a body has performed its duty it has no power to undo its action.

5. On 1 February 2018 a letter was sent by the PHSO to Bernard Jenkin MP, Chair of the Public Administration and Constitutional Affairs Committee (PACAC). In that letter Rob Behrens, Ombudsman and Chair of PHSO explains that the PHSO's historical advice had been given in good faith and based on an interpretation of the legislation in an area where there is a distinct lack of clarity in the drafting. The letter goes on to set out the PHSO's 'new approach'.

6. In that letter the PHSO states that it has taken further advice and concluded that, rather than requiring a submission to the High Court, it is possible for the Ombudsman to decide to 'quash' a report. In practice this would involve writing to all the recipients of the report making clear that they should not rely on its findings, setting out the very exceptional circumstances that had led to the decision to quash and requesting any copies be returned or destroyed. The letter notes that there is no specific power in the legislation to compel recipients to follow the action, but it

would at least be a clear signal that the findings should not be relied on more widely, for example by a coroner during an inquest.

7. Despite the lack of any power to compel recipients to return the report or withdraw copies, it appears clear to the tribunal that quashing the report is a unilateral action by the Ombudsman and does not require the consent of any other bodies.

8. On the basis of this new understanding of the PHSO's powers a decision was taken to quash a report produced in about 2011 into the death of the mother of Janet and Maggie Brooks ('the Brooks report'). It is not in the tribunal's remit to make findings of fact about this investigation or report, but it is the tribunal's understanding that the PHSO accepts that the Brooks report's conclusions were, inter alia, based on incomplete medical evidence.

9. Written evidence from Janet and Maggie Brooks to the Public Administration and Constitutional Affairs Committee in 2018 sets out their reasons for their dissatisfaction with this decision. In March 2018 the Coroner who conducted the original inquest stated, in a letter to the Attorney General, that she might have reached a different conclusion on cause of death and found neglect is she had seen the omitted medical reports.

10. Since the quashing of the Brooks report, the NHS Trust involved have not responded to the letter sent to them by the PHSO informing them that the report has been quashed and have not returned copies as requested. Janet and Maggie Brooks are concerned that the NHS Trust will attempt to rely on the quashed report at the second inquest. They think it is quite likely that the NHS Trust will argue that the report still stands in law. They will argue that reports can only be quashed by the High Court because the Ombudsman is functus officio once a report is published. They fear that this could compromise the second inquest and if they are not represented they may be helpless to prevent this.

Requests, Decision Notice and appeal

The Request

11. This appeal concerns the following request made on 25 February 2018:

> In his letter of 1 February to Bernard Jenkin at PACAC relating to withdrawing reports, Mr Behrens stated that "Following careful consideration of the issues by our legal team and senior colleagues, I am now able to update you on what an approach will be in relation to such matters going forward". A link to the letter is shown below.
>
> https://parliament.uk/documents/com...
>
> a) Please provide all advice, notes, documents, emails etc. from colleagues, the legal team, and Mr Behrens relating to withdrawing or quashing reports.

b) Please also provide the same advice, notes, documents, emails etc. from colleagues, the legal team, and previous Ombudsman, relating to withdrawing or quashing reports, particularly any advice, notes, documents, emails etc. suggesting reports could not be withdrawn or quashed.

c) Please provide details of how a final report is treated when, after review and further investigation, is superseded by a second report in which the outcome of investigation is changed from "not upheld" to "upheld"

12. In response to a request from the PHSO for clarification, Mr Wheatley confirmed on 8 March 2018 that the request was not limited to information related to the letter of 1 February 2018.

The Response

13. The PHSO replied on 16 March 2018 confirming that the PHSO held information relevant to the request. The PHSO stated that s 36(2)(b)(ii), 36(2)(c) and 42(1) FOIA were engaged. On 24 April 2018 the PHSO informed Mr Wheatley that it was withholding most of the information under these sections along with s 40(2). The PHSO disclosed some of the information on the basis that the public interest balance under s 36 favoured disclosure of that information.

14. Mr Wheatley requested an internal review on 9 May 2018. In it Mr Wheatley limited his request to information produced prior to 1 February 2018. The PHSO responded to the internal review on 18 June 2018. The review upheld the original decision but provided an answer to the question in part 'c' of the request on the basis that no response had been provided to this part.

15. Mr Wheatley referred the matter to the Commissioner on 19 August 2018. During the course of the Commissioner's investigation the PHSO confirmed that it no longer relied on s 36 and disclosed some further information to Mr Wheatley.

The Decision Notice

16. In a decision notice dated 7 May 2019 the Commissioner decided that the PHSO had correctly applied s 40, 42 and 44 FOIA for the following reasons.

S 42 – Legal professional privilege

17. The withheld information was confidential communication between PHSO employees and PHSO legal advisers for the main purpose of requesting and obtaining legal advice relating to the legal status of PHSO decisions. This legal advice was for the purpose of advising the PHSO on the Ombudsman's powers and functions and not on organisational matters. It is therefore subject to legal advice privilege and s 42 is engaged.

18. The public interest favours maintaining the exemption because the public interest in understanding how this significant decision was made is outweighed by the strong public interest in maintaining the important principle behind legal professional privilege.

S 44 – Statutory prohibitions on disclosure

19. The Parliamentary Commissioners Act 1967 (PCA) prohibits disclosure of information obtained during an investigation. The withheld information falls within this prohibition. If the PHSO has decided not to use an exemption to dis-apply the prohibition or a gateway to allow it to disclose the information, the prohibition continues to apply for the purposes of s 44. The information is therefore exempt.

S 40 – Personal data

20. In relation to the information already disclosed the contact information and names have been correctly withheld by redaction under s 40(2). The redacted information is personal data. Only the personal data of junior members of staff has been withheld. In those circumstances any legitimate interest in disclosure does not outweigh the individual's right to privacy.

Notice of Appeal

21. The tribunal has read and taken account of the grounds of appeal in full. In outline, the grounds are that the Commissioner failed to exercise her discretion correctly and failed to understand the facts and address the questions of law correctly. Mr Wheatley argues, in summary, that:

Documents not provided to the ICO by the PHSO

22. The PHSO have failed to supply the correct documents to the Commissioner. They should have supplied documents related to the quashing of reports or decisions not documents related to the legal status of decisions and reviews. They have not supplied communications between senior colleagues about the quashing of reports nor the legal advice the PHSO referred to in correspondence in 2018. Mr Wheatley strongly suspects that external legal advice has been withheld.

Legal professional privilege

23. Legal professional privilege is limited in scope in the following ways:
    - 23.1. If junior employees provide advice or information to the client it is not covered by legal professional privilege.
    - 23.2. If advice or information is provided to junior employees by the legal department it is not covered by legal professional privilege.

24. If advice is widely shared within an organisation then legal professional privilege no longer applies.

25. Therefore legal professional privilege would be lost if senior colleagues who were not legal officers were involved in the considerations or if advice was shared with them or junior colleagues.

26. It is inconceivable that the Ombudsman and senior colleagues and the legal team considered all the issues relating to quashing without communicating with or taking advice or information from junior staff or having discussions which did not involve legal professional privilege.

Legal professional privilege - public interest

27. Disclosure would allow the public to confirm for themselves that the PHSO's new approach is lawful, and to understand why this decision was made and how it is justified:
    - 27.1. The PHSO has arrogated a power formerly only within the remit of the High Court. This power is without a prima facie legal basis because of the principle of functus officio.
    - 27.2. The PHSO does not seem to have considered quashing the Brooks report by obtaining a consent order from the High Court.
    - 27.3. The PHSO might have chosen to adopt an approach which it knew or suspected was unlawful on the assumption that it would be hardly used and unlikely to be tested by a Court.
    - 27.4. The PHSO has not explained the legal basis for its new approach.
    - 27.5. The PHSO's decision to quash the Brooks report has 'gone off the rails' and caused distress and anxiety to Maggie and Janet Brooks.
    - 27.6. The PHSO has not explained why it took this approach.

28. There is a lack of oversight and accountability of PHSO, which means that members of the public attempt to carry out scrutiny themselves.

29. The PHSO is part of the legal and judicial landscape of the UK and public confidence in the system is of primary importance. It is vital that the Ombudsman, as a public official, is seen to act with honesty and integrity. Any suggestion that he might act unlawfully is harmful to his office and the legal and judicial system. It would not be in the public interest to withhold information that might reveal unlawful conduct by a public official and to allow that conduct to continue. If the information is released it will hopefully show that the Ombudsman has behaved lawfully and will restore public confidence.

30. There is currently a lack of confidence in the Ombudsman amongst complainants who have used his service.

31. Even though the advice is recent that should not prevent disclosure. The legal advice does not relate to a dispute and there is no suggestion that litigation may take place. If the policy is lawfully based the PHSO can defend its legal interests.

S 44 – Statutory prohibitions on disclosure

32. The relevant statutes prohibit the disclosure of information obtained during an investigation. It does not follow that all information about an investigation can be withheld. For example it does not prohibit the disclosure of a summary of the report or investigation. It seems likely that information within the scope of the request was not obtained during the investigation.

33. Maggie and Janet Brooks have given their consent to the disclosure of documents relating to their case.

34. S 7(2) of the Parliamentary Commissioners Act 1967 falls away once a report has been issued.

S 40(2) – Personal data

35. One redacted name appears to be a senior member of staff because it is in the context of decision making at a high level and should be disclosed. The remaining documents should be rechecked to confirm whether any other senior members of staff have been redacted in error.

Responses and submissions

The ICO's response

Scope of the request – incorrect and missing documents

36. The PHSO can address the issue of any further information held by them but not disclosed to the Commissioner.

Loss of legal privilege

37. An organisation is entitled to circulate legal advice internally without waiving its privilege, unless it is circulated without restrictions on confidentiality.

Public interest in legality, transparency and oversight

38. The Commissioner recognises that there is a public interest in order to enhance accountability and transparency, particularly where the PHSO has recently changed its interpretation of its powers. The Commissioner is not persuaded that any of the reasons advanced by Mr Wheatley are sufficient to outweigh the very strong interests in maintaining legal professional privilege.

39. It is not for the Tribunal to determine whether Mr Wheatley's or the PHSO's view on the legality of its actions is correct. The fact of disagreement is not enough to override privilege and will almost always be present in requests for access to privileged legal advice. Transparency does not weigh heavily in the balance because it will always be advanced by disclosure. The Commissioner accepts that there are limited oversight mechanisms but there is scope for judicial review of the PHSO's decisions. There can be public debate of the correct legal position and accountability without disclosure of privileged advice.

40. The fact that the advice is recent increases the public interest in preserving legal privilege.

Interpretation of the statutory bar to disclosure

41. The Commissioner agrees that the statutory prohibition is limited to information obtained during an investigation. This can include information that has been generated internally and that address internal discussions about how to progress a complaint where it relates to specific investigations and is not separate to the parts of information that considers the substance of the complaints.

Personal data

42. The Commissioner agrees that the senior employee's name should be disclosed.

The PHSO's response

Scope of the request – incorrect and missing documents

43. The PHSO asserts that no documents have been deliberately omitted. One document may have been overlooked and not provided to the Commissioner. This has now been provided to the tribunal.

Loss of legal privilege

44. There is no evidence that Legal Privilege has been lost by the Second Respondent by wide dissemination. It is entirely proper to obtain legal advice and disseminate to staff and this does not mean that privilege has been waived. Staff will either be informed that the advice is privileged or it will be marked as such.

Public interest

45. Legal professional privilege is 'a fundamental condition on which the administration of justice as a whole rests' (**R v Derby Magistrates exp P** [1996] 1 AC) and attracts particular weight in the public interest balance. It is accepted that Mr Wheatley has queries about the quashing process. This cannot be resolved by the disclosure of advice which, by its nature, is only advice: it is not legally binding. There may be different views by different legal professionals on the same matter.

Neither the PHSO nor any third party is obliged to accept that advice. Only a court can decide if the action is illegal or not.

46. If disclosure was ordered, it would undermine the PHSO's ability to seek and obtain legal advice. If Mr Wheatley is discontented and wishes to challenge the legal position on quashing there is a real possibility that litigation may ensue and disclosure may specifically prejudice the PHSO.

Statutory prohibition

47. The PHSO adopts the submissions of the Commissioner. The prohibition is mirrored in s 15 of the Health Commissioners Act 1993.

Personal data

48. The PHSO accepts that it is appropriate to disclose the redacted name highlighted by Mr Wheatley.

Mr Wheatley's response

49. In his response Mr Wheatley reiterates and elaborates on most of the points made in the grounds of appeal. Whilst the tribunal has read and taken account of these points they will not be repeated here.

50. In addition Mr Wheatley submits that the Second Respondent has misrepresented the rationale and context for the request. First, Mr Wheatley accepts that this is a 'legally grey' area. Second, the rationale and context is not limited to the question of whether or not it was unlawful for the PHSO to quash a report. Mr Wheatley highlights the passages in the grounds of appeal/other documents that set out the wider context, including the effect of PHSO's actions in relation to the Brooks report.

51. The primary grounds for appeal are that the public interest test and the law on statutory prohibition have been misapplied.

Loss of legal privilege

52. Mr Wheatley accepts that privileged material may be disseminated within an organisation without waiving privilege if it is marked as privileged or confidential. It would be waived if it were logged on a computer system freely available to staff.

53. Legal professional privilege only extends to communications between the client and the legal adviser. Information passed between others is not within scope, unless it is information that was originally provided to the client by the legal advisor or vice versa.

Public interest

54. The public interest in disclosure includes the interest in maintaining confidence that the Ombudsman has acted lawfully and with integrity, particularly in the context of the effect of its decision to quash the Brooks report. 100,000 people bring queries to the Ombudsman every year.

55. There is no oversight mechanism: the PCAC's scrutiny is limited to the Ombudsman's annual report and any other reports he lays before Parliament.

Statutory prohibition

56. Any information obtained after an investigation was completed would not be covered by the exemption unless it refers to information that had been obtained in the course of an investigation. Background information on the substance of complaints cannot be exempt from disclosure unless it contains information obtained during an investigation. Internally created documents would not be covered unless they are derived from information obtained in the course of an investigation.

Misleading statements from the decision notice

57. The tribunal notes the statements in the Decision Notice with which Mr Wheatley takes issue.

Further submissions from Mr Wheatley

58. Mr Wheatley provided a number of additional submissions dated 12 November 2019, 2 December 2019, 12 December 2019 and 14 January 2020. The tribunal has read and taken account of all of these. Some of these additional submissions reiterate or amplify submissions or grounds of appeal set out above and will not be set out here.

59. In addition Mr Wheatley asked the tribunal to comply with the recommendation in **Browning v Information Commissioner and DBIS** [2013] UKUT 236 (AAC) and provide detail on the information contained in the closed bundle.

60. In Mr Wheatley's submissions dated 14 January 2020 he takes issues with what he sees as PHSO's suggestion that he has an ulterior motive in bringing the appeal. Finally he suggests that external legal advice from around September 2016, early 2018 and potentially on other occasions should have been provided to the tribunal. He asked that this is considered by the tribunal as a preliminary issue and an order made to direct the PHSO to disclose all external legal advice relating to the quashing or withdrawing of reports.

Evidence

61. We have read and taken account of an open and a closed bundle of documents and a small bundle of additional open documents.

62. It is necessary that the documents in the closed bundle are not revealed to Mr Wheatley because to do otherwise would defeat the purpose of the proceedings. The tribunal accepts that in accordance with the guidance given by the Court of Appeal in Browning we are required to disclose as much as possible about the closed bundle when writing our decision.

63. In accordance with the guidance in Browning, the tribunal records that the documents in the closed bundle mainly comprise confidential emails and other communications between legal advisors and the 'client' (see our discussions below) for the purposes of obtaining legal advice and assistance. The bundle also contains some confidential correspondence and documents which summarise or record the content of legal advice. There are two documents which do not fall into these categories, identified in the closed annex. These are letters sent from the Ombudsman to individual complainants directly relating to an investigation by the PHSO.

Legal framework

S 42 – Legal Professional Privilege.

64. Section 42(1) provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

65. 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').

66. Legal professional privilege comprises two limbs, legal advice privilege and 'litigation privilege'. We are concerned in this appeal with legal advice privilege: confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance.

67. The rationale behind the principle of legal advice privilege is set out in the Supreme Court's decision in Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6) [2004] UKHL 48 ('Three Rivers (No 6)') at paragraph 34. After summarising the relevant authorities, Lord Scott said:

> None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that

> in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of Zuckerman's Civil Procedure (2003) where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.

68. Mr Wheatley relies on the Court of Appeal's decision in Three Rivers District Council v Governor and Company of the Bank of England (No.5) ('Three Rivers (No.5)')2003] EWCA Civ 474. In considering and applying the legal principles the tribunal has been assisted in its analysis of the applicable decisions by the commentary in Passmore, C, *Privilege (3rd Edition)*, Sweet and Maxwell.

69. The Court of Appeal in Three Rivers District Council v Governor and Company of the Bank of England (No.5) ('Three Rivers (No.5)')2003] EWCA Civ 474 limits the range of employees of a company whose communications with the company's lawyers are covered by legal advice privilege. Only employees who are acting as 'the client' will be covered. In Three Rivers No.5 the Bank had created a separate entity that was specifically responsible for seeking the advice in question, which was held by the Court of Appeal to be the client for the purposes of legal advice privilege.

70. In AB v Ministry of Justice [2014] EWHC 1847 (QB) the High Court considered the question of the identity of the client in a situation where advice was sought from in-house lawyers. At para 43, Baker J said that the Court of Appeal in Three Rivers (No.5) was dealing with 'a markedly different set of circumstances'. There was no separate entity specifically responsible for seeking the legal advice in question in AB v Ministry of Justice. Further, in the absence of any evidential challenge that the employee in question (head of the Coroner's Section of the department) lacked authority to seek legal advice of the nature and extent that he did from the Department's in-house lawyer, Baker J held that in that capacity it was implicit that he had authority to seek such advice.

71. In Menon, Menon and Autumn Days Care Limited v Herefordshire Council [2015] EWHC 2165 (QB) the in-house lawyers, 'provided legal advice to all officers and staff working for and on behalf of it, on all matters as and when necessary, pursuant to the work they are carrying on for and on behalf of the Defendant' and all officers and staff were entitled to use its services. On that basis Lewis J held that:

> …the employees in the present case were authorised to obtain legal advice from the Defendant's in house lawyers in connection with the discharge by them in the course of their work of functions on behalf of the Defendant. In those circumstances, the employees in question were clients for the purposes of legal advice privilege.

72. Legal advice privilege also protects confidential communications to third parties, including employees that are not 'the client', that record, evidence, reproduce or otherwise reveal the legal advice. So a record of the privileged advice in the form of a summary of the advice would also be protected: The 'Good Luck' [1992] 2 Lloyd's Rep. 540; The 'Sagheera' [1997] 1 Lloyd's Rep. 160. In Three Rivers (no.5) it was held that legal advice privilege applies both to communications between the client and the legal advisor and documents evidencing such communications.

73. S 42 is a qualified exemption, so that the public interest test has to be applied. It is recognised that there is a significant 'in-built' interest in the maintenance of legal professional privilege (DBERR v O'Brien and Information Commissioner [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. The tribunal recognises that "although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption" (DCLG v IC and WR [2012] AACR 43 at [44]) and the weight will vary according to the specific facts of each case.

74. We adopt the approach as set out in DBERR v O'Brien and Information Commissioner:

> ...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.

S 44 – Disclosure prohibited by statute

75. Section 44(1)(a) provides that information is exempt information if its disclosure is prohibited by or under any enactment. It is an absolute exemption so the public interest balance does not apply.

76. The prohibition relied on is s 11 of the Parliamentary Commissioners Act 1967 (PSCA) which provided, at the relevant time:

(2) Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except –
(a) for the purposes of the investigation and of any report to be made thereon under this Act;
(aa) for the purposes of a matter which is being investigated by the Health Service Commissioner for England or a Local Commissioner (or both);
(b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Act or for an offence of perjury alleged to have been committed in the course of an investigation under this Act or for the purposes of an inquiry with a view to the taking of such proceedings; or
(c) for the purposes of any proceedings under section 9 of this Act;
and the Commissioner and his officers shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid) of matters coming to his or their knowledge in the the course of an investigation under this Act.

77. S 15 of the Health Commissioner Act 1993 is the equivalent provision for the PHSO's other office.

Personal data

S 40 – Personal Information

78. The relevant parts of s 40 (applicable at the date of the request, which was prior to amendments made under the Data Protection Act 2018) of FOIA provide:
(2) Any information to which a request for information relates is also exempt information if-
(a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied.
(3) The first condition is-
(a) in a case where the information falls within any of paragraphs (a)-(d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
(i) any of the data protection principles...
...

79. Personal data is defined in s1(1) Data Protection Act 1998 ('DPA') as:

data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller..

80. The first data protection principle is the one of relevance in this appeal. This provides that:
1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
(a) at least one of the conditions in Schedule 2 is met..." (See para.1 Sch 1 DPA).

81. The only potentially relevant condition in Schedule 2 DPA is section 6(1) which provides that the disclosure is:

> necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.' (See para. 6 Sch. 2 DPA)

82. The case law on section 6(1) has established that it requires the following three questions to be answered:
    - 82.1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
    - 82.2. Is the processing involved necessary for the purposes of those interests?
    - 82.3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The role of the tribunal

83. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

84. The issues for the tribunal to determine are:

1. *Documents provided by the Second Respondent*
    - 1.1. Has the Second Respondent provided the tribunal with all the information that it holds within the scope of the request?

2. *Legal professional privilege*
    - 2.1. Is the information within the scope of legal advice privilege, i.e. confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance, or between others that record, evidence, reproduce or otherwise reveal the legal advice.
    - 2.2. Has any such privilege been waived?
    - 2.3. Does the public interest in withholding the information outweigh the public interest in disclosure?

3. *S 44 – Statutory prohibition on disclosure*
    - 3.1. Was the information obtained by the PHSO during or for the purposes of an investigation?

4. *Personal data*

4.1. Has the PHSO withheld the personal data of senior employees?

Discussion and conclusions

Preliminary note

85. Mr Wheatley's motive in making the request is irrelevant to our decision. We have therefore taken no account of any suggestion of any ulterior motive.

Have all the relevant documents been provided by the PHSO?

86. The tribunal has considered carefully the documents provided by the PHSO in the closed bundle. We have also considered carefully Mr Wheatley's submissions and the written evidence that suggests when the PHSO might have obtained external or internal legal advice. Having reviewed the above we are satisfied that there is no evidence to suggest that there are any documents which potentially fall within the scope of the request which have not been provided to the tribunal by the PHSO. The tribunal notes that the PHSO acknowledges that one document may not have been before the Information Commissioner. The tribunal now has that document.

Are the documents covered by legal advice privilege?

87. The PHSO has an in-house legal department. In the absence of any evidence to the contrary, we infer that its purpose is the same as that in Menon i.e to provide legal advice to all officers and staff working for and on behalf of it, on all matters as and when necessary, pursuant to the work they are carrying on for and on behalf of the PHSO. Therefore we imply that if the withheld documents consist of communications for the purpose of giving or receiving legal advice or assistance between in-house lawyers and PHSO employees those employees had the authority to obtain legal advice from the in-house lawyers and therefore were the client for the purposes of any internal legal advice.

88. Further if the withheld documents consist of communications for the purpose of giving or receiving legal advice or assistance between employees or officers of the PHSO and external lawyers, we readily imply that those particular employees or officers were tasked with obtaining that advice, and therefore were the client for the purposes of any external legal advice.

89. Where an employee is not directly involved in the seeking of legal advice, the Court of Appeal's decision in **Three Rivers (no. 5)** means that they are not 'the client' for the purposes of legal advice privilege. Legal advice privilege would therefore not apply to information provided by employees not directly involved in the seeking of advice to or for the purposes of being placed before the lawyer.

90. The sharing of legal advice with employees who are not directly involved in the seeking of legal advice is covered by legal advice privilege. Privilege would not

therefore be lost simply because junior employees were, for example, present at a conference with Counsel. Further, any internal communications which summarise or reveal the advice are covered, even if the sender is not the legal advisor and the recipient is not the 'client'. We accept the Second Respondent's submissions that there would be no waiver of privilege where advice is shared with staff who are aware that the advice is privileged.

91. The tribunal has considered each of the documents in the closed bundle. Applying the above principles we conclude that they are all, save for two documents identified by number in the closed annex, covered by legal advice privilege because they fall into one or more of the following categories:

    91.1. Confidential communications for the purpose of giving or receiving legal advice or assistance between a lawyer and a client; and/or
    91.2. Confidential communications which summarise or reveal privileged advice.

92. Further we conclude that there is no evidence in the open or closed bundle to support a conclusion that this privilege has been waived.

93. The tribunal considers that the reason why we have reached this conclusion would be obvious to anyone reading the closed bundle in conjunction with our reasoning set out above. In accordance with Browning we confirm for the benefit of the claimant that we have not set out any additional reasoning in the closed annex. The annex consists solely of a list of the two pages which do not fall within the scope of legal advice privilege.

Public interest

94. Mr Wheatley has set out clearly the public interest in disclosure. We take full account of all the points that he has raised. It is in the public interest to understand the reasoning behind the ombudsman's change in approach to its power to quash its own decisions. Whilst revealing legal advice would not show if the ombudsman's actions were or were not unlawful, we accept that it is in the public interest to know whether this action was taken against or in accordance with legal advice. It would increase public understanding and the ability to challenge the ombudsman's change in approach if the public could read all the legal advice which has been received on this issue by the ombudsman. This public interest is heightened because the accountability and scrutiny of the ombudsman is very limited. Further the ombudsman's decisions have very real consequences for a large number of people, as illustrated by the experience of the Brooks family.

95. Weighed against this is the significant 'in-built' interest in the maintenance of legal professional privilege. Legal professional privilege is 'a fundamental condition on which the administration of justice as a whole rests' (R v Derby Magistrates exp P [1996] 1 AC).

96. The ombudsman's change of approach was very recent at the time of the request. Mr Wheatley has drawn our attention to the perceived impact of the ombudsman's actions on the Brooks family, and on his own views on the prima facie lack of lawful basis for the ombudsman's actions. Although no litigation is ongoing or contemplated, we accept that there is a real possibility of a legal challenge to the ombudsman's approach. This adds some limited weight to the interest in the maintenance of legal professional privilege.

97. However, it is clear that the very strong public interest in maintaining this exemption for legal advice privilege does not rest on there being a real possibility of litigation and we take account of the rationale for legal advice privilege set out in para 34 of Three Rivers No.6 (set out above).

98. Taking all the above into account, we find that although Mr Wheatley has demonstrated that there is a significant public interest in disclosure, it is outweighed by the very strong interest in maintaining the exemption.

Statutory prohibition

99. We have considered this exemption in relation to the two documents that we consider do not fall within the scope of legal advice privilege. The question for the tribunal is whether the requested information is information that was obtained during or for the purposes of an investigation. As indicated above, the two documents are letters written by the Ombudsman to complainants. Simply because a document was created after an investigation is concluded does not mean that it does not contain information obtained for the purposes of that investigation. Although created internally, we find that both letters contain information obtained externally for the purposes of an investigation.

100. We find that the disclosure of the information is prohibited under an enactment and s 44 is engaged. This is an absolute exemption.

Personal data

101. The grounds of appeal challenge the redactions on the basis that senior employees' names might have been redacted. We understand that it is accepted by all parties that junior employees' names and contact information should be redacted. Had we needed to decide the issue we would have concluded, in outline, that the Second Respondent was entitled to rely on s 40(2) of the FOIA on the basis that this information was personal data, that disclosure would be unfair because junior employees would have a legitimate expectation that their personal information would not be disclosed and because disclosure is not necessary for the pursuance of a legitimate interest.

102. The specific personal data highlighted by Mr Wheatley in relation to one redaction has now been disclosed. There is no evidence before us to support a

finding that any other redacted personal data relates to senior employees. On this basis we accept the PHSO's submission that it has only redacted the data of junior employees.

Summary of conclusions

103. The tribunal concludes that the PHSO was entitled to withhold the information under s 40, 42 and 44 FOIA. In reaching this conclusion we find that:
    103.1. The PHSO has provided the tribunal with all the information that it holds within the scope of the request.
    103.2. All the information in the closed bundle except two documents falls within the scope of legal advice privilege, i.e. confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance, or between others that record, evidence, reproduce or otherwise reveals the legal advice.
    103.3. Privilege has not been waived.
    103.4. The public interest in withholding the information outweighs the public interest in disclosure.
    103.5. In relation to the two documents not covered by legal advice privilege, the information was obtained by the PHSO for the purposes of an investigation.
    103.6. The PHSO has not withheld the personal data of senior employees.

104. The appeal is therefore dismissed. The tribunal's decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 6 April 2020
Promulgation date: 14 April 2020