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Tribunals Service
Information Rights

IN THE FIRST-TIER TRIBUNAL **EA/2009/0106**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FER0272686
Dated: 2 November 2009

Appellant: **DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS**

Respondent: **THE INFORMATION COMMISSIONER**

Additional Party: **MR SIMON BIRKETT**

Before

Annabel Pilling (Judge)
Henry Fitzhugh
and
Rosalind Tatam

Representation:

For the Appellant: Jonathan Swift QC, Alexander Ruck Keene
For the Respondent: Ben Lask
For the Additional Party: Gerry Facenna, Laura Elizabeth John

WRITTEN REASONS FOR DECISION ON PRELIMINARY ISSUE: APPLICATION FOR DIRECTION OF THE CLOSED MATERIAL TO COUNSEL

Introduction

1. The Department for Environment, Food and Rural Affairs ('Defra') appeals against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 2 November 2009. The

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Decision Notice relates to a request for information made by Mr Simon Birkett of the Campaign for Clean Air London to Defra which was dealt with under the Environmental Information Regulations 2004 (the 'EIR') as the request related to information that was environmental.

2. The request, made on 22 January 2009, was for:

   "any minutes, appears, correspondence or other material relating to any meeting (including sent subsequent to it) that takes place between Lord Hunt and Mayor Johnson."

3. Defra treated the request as being for information relating to a meeting between Lord Hunt and the Mayor that took place on 22 January 2009 concerning air quality in London. It refused the request, relying on the exception in Regulation 12(4)(e) EIR[1] and concluding that the public interest in maintaining the exception outweighed the public interest in disclosure. An internal review upheld that decision.

4. The Commissioner issued his Decision Notice without viewing the disputed information and concluded, at paragraph 26:

   "… that the public authority did not deal with the request for information in accordance with the Environmental Information Regulations. The Commissioner considers the Mayor of London to be a separate public authority and not part of a government department therefore the information requested would not constitute internal communications and regulation 12(4)(e) and 12(8) would not apply."

5. He required Defra to provide the requested information in accordance with Regulation 5(1) EIR within 35 days of the date of the Decision Notice.

[1] A public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

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6. Defra appealed to the Tribunal on 1 December 2009 on the following grounds:

   > *"First, the Commissioner was wrong to conclude that the information held by Defra falling within the scope of the request ("the disputed information") did not fall within regulation 12(4)(e) EIR…*
   >
   > *Second, to the extent that the disputed information comprised information in respect of which legal advice privilege could be maintained, the disputed information fell within the scope of the exception at regulation 12(50(d) and/or (b)*[2]*.*
   >
   > *Third, save for the extent identified at 10 below, the public interest in maintaining the confidentiality of the disputed information outweighs any public interest in the disclosure of that information."*

7. At paragraph 10, Defra indicated that it did not seek to resist the disclosure of certain parts of the disputed information. This was subsequently disclosed on 24 December 2009.

8. Mr Birkett, represented by Friends of the Earth, was joined as an Additional Party by the Tribunal.

9. During the preparation of this matter for the hearing of the appeal, Defra has disclosed additional parts of the disputed information; on 11 March 2010 and 6 April 2010.

10. The remaining disputed information amounts to the redacted parts of documents identified as A, B, C, D and E:

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[2] A public authority may refuse to disclose information to the extent that its disclosure would adversely affect (b) the course of justice…..; (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.

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A - A submission from Robert Vaughan to Lord Hunt dated January 2009 entitled "Briefing for meeting with Boris Johnson to discuss air quality in London" (*3 paragraphs);*

B - E-mails from Robert Vaughan to Robin Mortimer and others, and from Robin Mortimer to Robert Vaughan and others, dated 20 January 2009 at 1739 and 1903 respectively, *(Names only)*;

C - An e-mail from Lord Hunt's private secretary to Peter Unwin and others dated 20 January 2009 at 2142 (*2 names and one paragraph);*

D - A further submission from Robert Vaughan to Lord Hunt dated 21 January 2009, entitled "Additional briefing for meeting with Boris Johnson to discuss air quality in London" (*Three sections*)*;*

E – An e-mail from Lord Hunt's private secretary to Robin Mortimer and others dated 23 January 2009 at 1053, containing a brief read-out of the key points (*Names only)*

11. The Commissioner is in agreement with Defra that some of the remaining disputed information can be withheld under the EIR.

<u>*Application on behalf of Additional Party*</u>

12. For the hearing of this appeal, the Tribunal was provided with an agreed bundle of documents, which included statements from Robert Vaughan, Head of National and Local Air Quality Management at Defra, who had dealt with the initial request for information, and from Simon Birkett, the Additional Party. We were also provided with a closed bundle of documents, which included the remaining disputed information and a further statement from Robert Vaughan.

13. The parties had agreed a timetable for the hearing that included evidence and submissions to be heard in both open and closed sessions.

14. Mr Facenna made an application on behalf of the Additional Party for the Tribunal to make a direction under Rule 5 of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 (the 'Rules') for disclosure of the closed material to Counsel acting on behalf of Mr Birkett to enable him to take part in the closed sessions. Counsel offered to sign an express undertaking to the Tribunal not to disclose the closed material or its content to anyone, including solicitor and client, and only to use the information for the purposes of these proceedings.

15. The application was made a few days before the hearing as Mr Facenna submits that, as a result of disclosure of much of the disputed information, Defra's and the Commissioner's position in relation to the remaining disputed information has only been clarified by the skeleton arguments exchanged on 4 May 2010.

16. While Mr Facenna accepts that it is not uncommon for the Tribunal to be in the position of considering information in closed session in circumstances where the Commissioner and the public authority both support maintaining an exception or exemption and withholding the information, he submits permitting him access to the closed material and thus to remain during the closed sessions would ensure that Defra's arguments are properly tested, both in cross-examination and in making submissions to the Tribunal, that Mr Birkett's interests are properly represented and that the strong public interest arguments in favour of disclosure of the disputed information can be fully aired to assist the Tribunal in our determination of the appeal.

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17. Mr Facenna put forward three reasons for justifying the direction in this case.

i)The use of "confidentiality rings" is well-established in other courts and tribunals

18. Although Mr Facenna concedes that the authorities he drew our attention to are distinguishable and on different facts, he submits that they are evidence of the well-established approach taken in other courts and tribunals.

19. In particular, he drew our attention to the use the Competition Appeal Tribunal makes of the "confidentiality ring" restricting disclosure of material to legal and external expert advisers. He relies upon a few selected references to such arrangements:

    a) *Claymore Dairies Ltd v Director General of Fair Trading (Disclosure: Confidentiality Ring)*[3] in which the Competition Appeal Tribunal held that it was in the public interest for litigation to take place with full disclosure wherever possible, that the Appellant needed access to the full reasons for a decision so that it could properly exercise its right of appeal but that a competitor also had an interest in protecting commercially sensitive material and business confidentiality. Those competing interests could be addressed by creating a confidentiality ring, whereby full disclosure would be made only to external legal and accountancy advisors;

    b) *British Sky Broadcasting Group Plc v Competition Commission*[4] in which the Competition Appeal Tribunal determined that disclosure of confidential evidence relied upon by the Competition Commission was necessary, relevant and proportionate to determine the issues before the

[3] [2003] CAT 12
[4] [2008] CAT 7

Tribunal. The confidential nature of the material was no obstacle to disclosure, given that the company concerned was content for it to be supplied to the parties' external legal advisers within the confidentiality ring;

c) *Hutchinson 3G UK Limited v Office of Communications*[5] – "At an early stage of these appeals, a confidentiality ring was set up by the Tribunal to ensure that information that the parties considered confidential was kept within the circle of the parties' legal advisers and external consultants;

d) *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform*[6] which was a statutory judicial review in the Competition Appeal Tribunal, a confidentiality ring was set up to include the other parties' legal advisers so that the Secretary of State could share confidential, market-sensitive information relating to his decision to allow the merger between HBOS and Lloyds.

20. Mr Facenna then drew our attention to comments made by the higher courts about the practice being "well-established"; in *British Sky Broadcasting v Virgin Media*[7] at paragraph 3, in *Roussel Uclaf v ICI*[8] at page 54 and *Dyson Appliances Ltd v Hoover Ltd (No.3)*[9] at paragraphs 27, and 33-35.

21. Mr Facenna submits that the parties before the Tribunal should be on an equal footing and that these authorities illustrate the approach taken by other courts and tribunals to ensure that.

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[5] [2008] CAT 11
[6] [2008] CAT 36
[7] [2008] EWCA Civ 612
[8] [1990] RPC 45
[9] [2002] EWHC 500

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i)Limited disclosure of confidential information is reflected in the Commentary to the Civil Procedure Rules (White Book 2010, at CPR 31.3.37)

22. This is the section headed "Technical Secrets" and refers to the "governing principle" where a party claims secrecy in relevant material that the Court should order a controlled measure of disclosure to select individuals upon terms to ensure the confidentiality of that material.

23. Again Mr Facenna submits that this is illustrative of the approach taken by the civil courts to ensure fairness between the parties to litigation.

ii)The Tribunal's own Rules

24. Mr Facenna submits that the Tribunal's own Rules require consideration to be given to the possibility of restricted disclosure in appropriate cases. Under Rule 2, the Tribunal must seek to give effect to the overriding objective when it exercises any power under the Rules or interprets any rule or practice direction. The overriding objective of the Rules is to enable the Tribunal to deal with cases fairly and justly.

25. Dealing with cases fairly and justly includes:

    (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

    (b) avoiding unnecessary formality and seeking flexibility in the proceedings;

    (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

26. Mr Facenna submits that there is a strong obligation on the Tribunal to ensure that the parties can play as strong a part as possible and the disclosing the closed material to Counsel would enable Mr Birkett to participate and for the Tribunal to hear opposing arguments that

otherwise it would not hear. In particular, he submits that he is Counsel with considerable experience in this area of law, European environmental issues and the work of the CCAL. He indicates that he will, so far as possible, avoid duplication of the Commissioner's arguments and will focus on areas where he can materially add to the Tribunal's understanding of the competing interests in this case, and/or where the Commissioner has decided not to oppose Defra's position on the public interest balance.

27. Our attention was also drawn to Rule 14 of the Rules which expressly envisages circumstances in which the Tribunal may order disclosure of information to a party's representative, on condition that the information is not disclosed to any other person, including the party. Mr Facenna accepts, however, that this Rule has no direct relevance in the present circumstances but relies on it to support his submission that the Tribunal has the power to make the order sought.

28. Mr Facenna submits that directing the disclosure of the closed material to Counsel would not add unduly to the cost, length or complexity of the proceedings and, on the contrary, would enable Counsel to make well-focused and relevant submissions during the closed sessions, avoiding broad and speculative submissions.

29. Mr Swift and Mr Lask agree that the Tribunal has the power to make such a direction but submit that the Tribunal should only make such a direction if it considers there are genuinely exceptional reasons why disclosure should be made. They submit that it is not necessary in this case.

30. Mr Swift took us through the Tribunal's Practice Note issued on 18 January 2010 setting out the arrangements for protecting confidential information in Information Rights Appeals before the First-tier Tribunal (General Regulatory Chamber).

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31. In brief, Mr Swift's submissions are that:

i) disclosure to Counsel would undermine the appeal process and result in Defra being required to do the very thing at issue in the appeal;

ii) the Tribunal need not consider Article 6 as the appeal does not involve a determination of civil rights and/or obligations;

iii) even if the case involved technical matters, which this does not, the Commissioner is well placed to draw all relevant matters to the Tribunal's attention;

iv) the arguments advanced by Mr Facenna with regard to cases before other courts and tribunals and the Civil Procedure Rules have no relevance. In those jurisdictions it would only be in exceptional circumstances that a party to the proceedings would not have access to all the material the Tribunal has access to, however, in this jurisdiction it is the other way round.

v) we should consider whether to make such a direction upon a consideration of the Tribunal's own Rules and its power under Rule 5 to regulate its own proceedings.

vi) Rule 14 is designed to deal with a specific set of circumstances and has no bearing on why the closed material has not been disclosed in this case;

vii) disclosure to Counsel could result in a change in the focus of cross-examination and submissions which would make apparent the content of the remaining disputed information.

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32. Additionally Mr Swift argues that if this was an exceptional case and the Tribunal was minded to direct the closed material be disclosed, we should consider appointing a Special Advocate to assist us rather than directing it to be disclosed to Counsel for the Additional Party.

33. This was the course taken by the Tribunal in *Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence*[10] in circumstances where the closed material had been provided "without explanation, piecemeal and in an incoherent manner that made it effectively impossible to understand" and put a six-day hearing at risk of being adjourned. The Tribunal emphasised that the justification for the appointment of a Special Advocate was "exceptional having regard to the nature and extent of the documents concerned" and that had the CAAT case been heard alone rather than being joined to another case, it would not have justified a Special Advocate.

34. Mr Lask provided the parties with the decision of a differently constituted Panel of this Tribunal in *People for the Ethical Treatment of Animals Europe v Information Commissioner and University of Oxford*[11] *('PETA')*. He submits that we should adopt the approach taken by the Tribunal in that case in refusing such an application to order disclosure to Counsel.

Our decision

35. We agree that the Tribunal has the power to make the direction sought; by Rule 5 the Tribunal may regulate its own proceedings, giving effect to the overriding objective in Rule 2 to deal with cases fairly and justly.

36. We do not consider that Rule 14 is applicable in this case. The Rules are applicable to a number of other jurisdictions within the General Regulatory Chamber in which the purpose of the proceedings is not to obtain the disclosure.

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[10] EA/2006/0040
[11] EA/2009/0076

37. While we accept that the establishing of a "confidentiality ring" is a practice adopted by other courts and tribunals, we do not consider that the authorities relied upon by Mr Facenna have any persuasive bearing on the decision we must make in this Tribunal. The examples provided, and the principles that emerge, relate to entirely different legal and factual scenarios in which parties to civil litigation would have been at a significant disadvantage if material before the Tribunal was not disclosed. As the Tribunal in *PETA* observed, in other jurisdictions there will be remedies available in the event of any breach which might go some way to mitigate the damage done by disclosure which is not available in this Tribunal. The authorities merely illustrate the approach taken in other jurisdictions, as part of ensuring that the litigation process is fair, and where the substantive issue to be determined is not whether that material must be disclosed.

38. The Tribunal's decision as to whether to make such a direction in an individual case must be considered in the context of the issues to be determined by the Tribunal and the individual facts of each case.

39. The Practice Note acknowledges that the nature of appeals to this Tribunal is such that the Tribunal will often require seeing information which must be kept confidential from other parties to the appeal. In practice, this is the position in every appeal where the requestor is a party. The Tribunal is therefore experienced in fulfilling its inquisitorial role and, if appropriate, exploring the evidence and submissions made in the closed session in light of the arguments advanced by the party excluded. We are also in a position to ask for assistance from the Commissioner, or even Mr Facenna, on a particular point if necessary.

40. We do not consider that this is an exceptional or unusual case and it does not merit either the appointing of a Special Advocate or the disclosure of the closed material to Counsel, thereby requiring Defra to disclose the material at issue in this appeal.

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41. Having read all the material in advance of the hearing, we are satisfied that we can fulfil our inquisitorial role without assistance. In this appeal the remaining disputed material is very far from voluminous. Without commenting on the technical content or otherwise, we are satisfied that the Additional Party can make the necessary arguments for disclosure without seeing the closed material in this case.

42. We are therefore not satisfied that it is appropriate to make a direction for disclosure of the closed material to Counsel for the Additional Party in this case.

Annabel Pilling 13 May 2010

Tribunal Judge

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IN THE FIRST-TIER TRIBUNAL **EA/2009/0106**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

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Dated: 2 November 2009

Appellant: **DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS**

Respondent: **THE INFORMATION COMMISSIONER**

Additional Party: **MR SIMON BIRKETT**

Before

Annabel Pilling (Judge)
Henry Fitzhugh
and
Rosalind Tatam

Representation:

For the Appellant: Jonathan Swift QC, Alexander Ruck Keene
For the Respondent: Ben Lask
For the Additional Party: Gerry Facenna, Laura Elizabeth John

WRITTEN REASONS FOR DECISION ON PRELIMINARY ISSUE: RELIANCE ON EXCEPTIONS NOT PREVIOUSLY RELIED UPON

Introduction

1. The Department for Environment, Food and Rural Affairs ('Defra') appeals against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 2 November 2009. The Decision Notice relates to a request for information made by Mr Simon

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Birkett of the Campaign for Clean Air in London to Defra which was dealt with under the Environmental Information Regulations 2004 (the 'EIR') as the request related to information that was environmental.

2. The request, first made on 15 January 2009 and repeated on 22 January 2009, was for:

   "any minutes, appears, correspondence or other material relating to any meeting (including sent subsequent to it) that takes place between Lord Hunt and Mayor Johnson."

3. Defra treated the request as being for information relating to a meeting between Lord Hunt and the Mayor that took place on 22 January 2009 concerning air quality in London. It refused the request on 1 April 2009, relying on the exception in Regulation 12(4)(e) EIR[1] and concluding that the public interest in maintaining the exception outweighed the public interest in disclosure. An internal review upheld that decision on 15 September 2009.

4. The Commissioner issued his Decision Notice without viewing the disputed information and concluded, at paragraph 26:

   "… that the public authority did not deal with the request for information in accordance with the Environmental Information Regulations. The Commissioner considers the Mayor of London to be a separate public authority and not part of a government department therefore the information requested would not constitute internal communications and regulation 12(4)(e) and 12(8) would not apply."

[1] A public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

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5. He required Defra to provide the requested information in accordance with Regulation 5(1) EIR within 35 days of the date of the Decision Notice.

6. Defra appealed to the Tribunal on 1 December 2009 on the following grounds:

   "First, the Commissioner was wrong to conclude that the information held by Defra falling within the scope of the request ("the disputed information") did not fall within regulation 12(4)(e) EIR…

   Second, to the extent that the disputed information comprised information in respect of which legal advice privilege could be maintained, the disputed information fell within the scope of the exception at regulation 12(50(d) and/or (b)[2].

   Third, save for the extent identified at 10 below, the public interest in maintaining the confidentiality of the disputed information outweighs any public interest in the disclosure of that information."

7. At paragraph 10, Defra indicated that it did not seek to resist the disclosure of certain parts of the disputed information. This was subsequently disclosed on 24 December 2009.

8. Mr Birkett, represented by Friends of the Earth, was joined as an Additional Party by the Tribunal.

9. During the preparation of this matter for the hearing of the appeal, Defra has disclosed additional parts of the disputed information; on 11 March 2010 and 6 April 2010. The remaining disputed information amounts to the redacted parts of documents identified as A, B, C, D and E:

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[2] A public authority may refuse to disclose information to the extent that its disclosure would adversely affect (b) the course of justice…..; (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.

A - A submission from Robert Vaughan to Lord Hunt dated January 2009 entitled "Briefing for meeting with Boris Johnson to discuss air quality in London" (*3 paragraphs);*

B - E-mails from Robert Vaughan to Robin Mortimer and others, and from Robin Mortimer to Robert Vaughan and others, dated 20 January 2009 at 1739 and 1903 respectively, *(Personal data only)*;

C - An e-mail from Lord Hunt's private secretary to Peter Unwin and others dated 20 January 2009 at 2142 (*Personal data and one paragraph);*

D - A further submission from Robert Vaughan to Lord Hunt dated 21 January 2009, entitled "Additional briefing for meeting with Boris Johnson to discuss air quality in London" (*Two sections and one Annex*)*;*

E – An e-mail from Lord Hunt's private secretary to Robin Mortimer and others dated 23 January 2009 at 1053, containing a brief read-out of the key points (*Personal data only)*

10. Prior to the hearing of this appeal, the Tribunal had the benefit of reading the agreed bundle of documents, which included statements from Robert Vaughan, Head of National and Local Air Quality Management at Defra, who had dealt with the initial request for information, and from Simon Birkett, the Additional Party. We also viewed the remaining disputed information and a further statement from Robert Vaughan which had been provided in a closed bundle, not made available to the Additional Party.

11. The parties had each provided full written submissions in advance of the hearing which we had read.

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Can exceptions be relied upon for the first time before the Tribunal

12. Defra maintains that it is entitled to withhold the remaining disputed information as identified above on the basis of the exceptions in Regulations 12(4)(e), 12(5)(b) and 12(5)(d), notwithstanding that the decision it made to refuse the request and at the internal review was on the basis of the exception in Regulation 12(4)(e) only[3].

13. The Tribunal therefore has to decide whether Defra can rely on the exceptions raised for the first time before the Tribunal as follows;

    i) must the Tribunal consider exceptions (or exemptions under FOIA) that are raised for the first time during the appeal; and,

    ii) if not, should the Tribunal allow Defra to rely on the exceptions in Regulation 12(5)(b) and/or 12(5)(d) in this case.

Submissions and Analysis

14. By Regulation 18(1) EIR, the enforcement and appeals provisions of the Freedom of Information Act 2000 ('FOIA') apply for the purposes of the EIR, (subject to the amendments of such provisions as set out in the EIR).

15. The Tribunal's powers in relation to appeals under section 57 of FOIA are set out in section 58 of FOIA, as follows:

    (1) If on an appeal under section 57 the Tribunal considers-

    (a) that the notice against which the appeal is brought is not in accordance with the law, or

[3] In relation to the personal data in items B, C and E, Defra relies upon the exception in Regulation 13 EIR. The other parties do not object to this as it involves third party rights, and therefore we have not considered this aspect of the appeal in this Decision.

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(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

16. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the law has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

17. Mr Lask and Mr Facenna both submit that there is no requirement for the Tribunal to allow a party to rely upon an exception or exemption not previously relied upon. They rely upon the "well established jurisprudence of the Tribunal" that the Tribunal has discretion whether to consider exceptions or exemptions raised for the first time before it. Our attention was drawn to previous decisions of this Tribunal in *Archer v Information Commissioner and Salisbury District Council*[4], *Department for Environment, Food and Rural Affairs v Information*

[4] EA/2006/0037

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Commissioner[5], *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth*[6]. These are just a few examples of cases in which this issue has been considered by the Tribunal. The principles that emerge through the Tribunal's decisions are that the Tribunal has no obligation to allow a party to rely upon an exception or exemption not relied upon previously and that each case must be decided on its own facts and merits.

18. There is no higher court authority on this point. Mr Justice Keith expressly declined to rule on this issue in *Home Office and Ministry of Justice v Information Commissioner*[7]*.*

19. A bundle of authorities was provided to us on the day of the hearing despite a direction that this should have been provided by 4 May 2010. Although not referred to by any party, we have also considered the decision of this Tribunal in Crown Prosecution Service v Information Commissioner[8]. After reviewing the Tribunal's own jurisprudence on the issue which we do not need to repeat, the Tribunal commented that the practice adopted was not novel and that it was well established that parties in civil litigation should not be permitted to take new points on appeal, referring to the comments of Lord Justice May in *Jones v MBNA International Bank*[9] *.*

20. Mr Swift submits that the entire current line of Tribunal decisions is wrong, that there is no legal basis for the discretion that has been identified and that the Tribunal has an *obligation* to consider any exception or exemption raised by a public authority at any stage in the process. He submits that the Tribunal is a statutory tribunal with jurisdiction *only* as provided for by statute. He submits that section 58 FOIA requires the Tribunal to consider whether the Decision Notice is

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[5] EA/2009/0039
[6] EA/2007/0072
[7] [2009] EWHC 1611 (Admin) at paragraph 46
[8] EA/2009/0077, paragraphs 12-31 of the substantive decision of 25 March 2010
[9] (unreported, 30 May 2000)

in accordance with the law and that there is nothing in the legislation that provides for any power to limit that requirement. To do otherwise would, he submits, result in situations where a public authority is required to disclose information even if that were contrary to the public interest.

21. Mr Swift invited us to adopt the approach taken by the Tribunal in *Bowbrick v IC and Nottingham City Council*[10]. In that case, the disputed information was only discovered after the appeal process had commenced and therefore exemptions were only relied upon before the Tribunal. That Tribunal considered that it was obliged to consider any exemption claimed, even it if it is claimed for the first time before the Tribunal.

22. Mr Facenna submits that *Bowbrick* is no longer good law as it was one of the earliest cases decided by this Tribunal and has been comprehensively overtaken by the line of cases identified above. Having drawn our attention to the relevant passages in those decisions, he submits that it would be contrary for this Tribunal to act in any other way.

The Tribunal's Decision

23. The purpose of the EIR, like FOIA, is to provide for the disclosure of information held by public authorities and the development of the Tribunal's jurisprudence on the late reliance on exceptions or exemptions arises from the underlying purpose of the legislation.

24. We do not consider that Parliament intended for a public authority to refuse to disclose information and only properly consider and identify the basis for non-disclosure after a requestor has complained to the Commissioner, and/or the Tribunal unless there are reasonably justifiable circumstances. There is a risk that this would lead to the

[10] EA/2005/0006

appeal process becoming cumbersome and uncertain, costs being incurred and could lead public authorities to take a more "cavalier" approach to their obligations under EIR or FOIA.

25. Against this, we do not consider that Parliament intended for a public authority to be required to disclose information that would otherwise be exempt, without any regard to the circumstances of the individual case.

26. Therefore, although as set out above, appeals before the Tribunal take the form of a rehearing of the matter before the Commissioner, this is an Appellate jurisdiction and the Tribunal must be able to control and manage its process.

27. We agree with the decisions of differently constituted Panels of this Tribunal that there is no obligation on the Tribunal to consider any exception relied upon by a public authority that had not previously been relied upon; exceptions or exemptions raised for the first time before the Tribunal should only be considered if there is a reasonable justification.

28. Having come to that conclusion, we must now consider whether in the circumstances of this case we should allow Defra to rely on the exceptions in Regulations 12(5)(b) and (d).

29. The Tribunal should only allow the late reliance on an exception by a public authority if there is a reasonable justification for why the exception was not raised previously. It is not desirable, or perhaps even possible, to set out a definitive set of guidelines as to when the Tribunal, will allow late reliance on an exception not previously relied upon. Each case must be decided upon its own facts.

30. Mr Swift comments that it is difficult to see a distinction between a public authority that does not conduct a thorough search, locates the relevant information late in the proceedings but is permitted to rely on

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an exemption late, and a public authority that does conduct a thorough search but is less diligent in its consideration of the relevant legislation. In this case, he submits that Defra "simply overlooked" the application of other exceptions as the disputed information was considered "in the round" as internal communications.

31. Mr Facenna and Mr Lask do not accept that "overlooking" the applicability of a particular exception amounts to reasonable justification for relying on it at a late stage in the proceedings. Mr Facenna submits that this is particularly the case in relation to this appeal as Defra must have known the jurisprudence was against it and that it would be required to provide justification for its failure to raise these exceptions earlier. Previous cases have considered matters such as the request being made at a time when the legislation had only recently come into force and the experience of the public authority in dealing with requests for information and applying the relevant legislation.

32. In the present appeal, the public authority is not only a government department well versed in the application of EIR and FOIA, but had also encountered exactly this issue in relation to another request for information. That matter was before the Tribunal in September/October 2009[11] when the Tribunal refused to allow it to rely on Regulations 12(5)(b) and (d) which had been raised for the first time during the appeal after an initial refusal to disclose based on Regulation 12 (4)(e). Defra did not appeal that decision.

33. We consider that there is no reasonable justification for Defra's "overlooking" of these exceptions.

34. We therefore decline to consider whether the remaining disputed information falls within the exceptions at Regulation 12(5)(b) and (d).

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[11] *Defra v Information Commissioner* EA/2009/0039

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Appeal

35. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.uk.

Annabel Pilling
Tribunal Judge

13 May 2010

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL

Appeal No: EA/2009/0106

BETWEEN:

DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

SIMON BIRKETT

Additional Party

RULING ON AN APPLICATION FOR PERMISSION TO APPEAL

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1. This is an application dated 14 June 2010 by the Department for Environment, Food and Rural Affairs ('DEFRA') for permission to appeal pursuant to Rule 42(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the 'Rules'). The application for permission to appeal relates to a decision of the First-tier Tribunal (Information Rights) (the 'Tribunal') dated 13 May 2010 not to consider whether the exceptions in Regulations 12(5)(b) and (d) of the Environmental Information Regulations 2004 (the 'EIR') were engaged on the basis that there was no reasonable justification for DEFRA not having relied on these exceptions prior to the appeal before the Tribunal.

2. DEFRA's application alleges that the Tribunal's decision was wrong in law and that there is no legal basis for the proposition that in proceedings before the Tribunal a public authority may be prohibited form relying on an exception under the EIR (or, in the context of the Freedom of Information

Act 2000 (the 'FOIA') for the sole reason that it had not relied on that exception either when refusing the original request for information or in the course of proceedings before the Information Commissioner. DEFRA sets out six grounds of appeal in paragraphs 14-26 of the application.

3. I accept that this is a valid application for permission to appeal under Rule 42 of the Rules. I have considered whether to review the decision under Rule 43 of the Rule, taking into account the overriding objective in Rule 2. In this case, I am not of the opinion that I should review the decision but that I should give permission to appeal for the following reasons:

   i) I am not satisfied that there was an error of law in the decision of 13 May 2010;

   ii) the application raises an important issue of general application which arises in many cases;

   iii) there is no binding authority on the issue of the late raising of exceptions;

   iv) the application also raises the issue of the timing of the public interest test should late exemptions be allowed.

4. Although the application correctly states that a similar issue arises under Freedom of Information Act 2000 (FOIA) cases, it should be borne in mind that the exemptions under FOIA are different from the exceptions under EIR, and, in some cases, have particular requirements such as that required under s.36(2) FOIA.

5. I therefore give permission for DEFRA to appeal to the Administrative Appeals Chamber of the Upper Tribunal on the grounds advanced.

6. Under Rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, DEFRA has one month from the date this Ruling was sent to it to lodge its appeal with:

The Upper Tribunal Office (Administrative Appeals Chamber),
5th Floor, Chichester Rents,
81 Chancery Lane,
London WC2A 1DD

DX: 0012 London/Chancery Lane

Annabel Pilling
Judge
First-tier Tribunal (Information Rights)
23 June 2010