



Tribunals Service
Information Tribunal

Information Tribunal

Appeal Number: EA/2006/0044

FREEDOM OF INFORMATION ACT 2000

Heard on the papers
Date: 20th November 2006

Promulgation Date
20th December 2006

Before the Information Tribunal

MR H FORREST (Deputy Chairman)
Mr A WHETNALL
Mr D WILKINSON

Between

MR TREVOR KITCHENER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

AND DERBY CITY COUNCIL

Additional Party

Representation:

Written representations were received from the information Commissioner.

DECISION

The tribunal upholds the decision notice dated 13th June 2006 and dismisses the appeal.

Reasons for Decision

The request for information

1. Mr Trevor Kitchener wrote to Derby City Council on 4th January 2005 to request information. He referred to dealings from the last several years between Derby City Social Services Department and members of his family, and asked to examine records, transactions and memoranda that related to this. This general request for information was broken down, “for a start”, into seven discrete categories.
2. Since much of the information requested related to named individuals, the Council initially refused the request, quoting Section 40 of the Freedom of Information Act, which in some circumstances makes personal data exempt information under the Act. Mr Kitchener complained to the Commissioner that his rights under the Freedom of Information Act had been breached.
3. After intervention from the Commissioner, the Council went through the procedures applicable under the Data Protection Act for the release of personal data, including obtaining consent from the individuals concerned. The recorded information in categories 2-7 of the request was then released by the Council to Mr Kitchener.
4. The information in Category 1 was withheld. The information requested was:
 1. Advice you received from your Barrister prior to the Crown Court (Family Division) proceedings which you initiated.

The Council refused to release this information on the ground that it was legally privileged, and therefore exempt from the obligation to disclose under Section 42 of the Freedom of Information Act. Mr Kitchener appealed the Council's refusal to the Information Commissioner.

The Complaint to the Information Commissioner

5. The Information Commissioner viewed the Barrister's advice sought, and was satisfied that the advice was subject to legal professional privilege. It was therefore, under Section 42 of the Freedom of Information Act, exempt from disclosure unless the public interest in disclosing it outweighed the public interest in maintaining the exemption. The Commissioner then considered a number of arguments in favour of the public interest in disclosing the information, and a number of arguments in favour of maintaining the exemption. He considered the public interest in maintaining the exemption clearly outweighed the interest in disclosure. He therefore upheld the Council's decision. It is against that Decision Notice that Mr Kitchener appeals to this tribunal.

The statutory framework

6. The relevant provisions of the Freedom of Information Act are as follows:

Section 1(1) Any person making request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

7. Section 2(2) In respect of any information which is exempt information by virtue of any provision of Part II, Section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(The exemption relied on, in Section 42 of the Act, does not confer absolute exemption. The balancing exercise in Section 2(2)(b) therefore has to be carried out in order to decide whether the duty to disclose applies or not).

8. Part II, Section 42(1) Information in respect of which a claim to legal professional privilege or, in Scotland to confidentiality of communications could be maintained in legal proceedings is exempt information.

9. The tribunal's powers on an appeal are set out in Section 58:

58(1) If on an appeal the tribunal considers –

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

- (2) On such an appeal the tribunal may review any finding of fact on which the notice in question was based.

Legal Professional Privilege

10. The first question arising for our consideration is whether the information requested falls properly within the scope of Section 42. Could a claim to legal professional privilege be maintained in legal proceedings for the Barrister's advice, which is sought by Mr Kitchener? To consider this, the tribunal decided that they needed to see the Barrister's advice for themselves. It was

therefore disclosed to the tribunal, subject to a direction that it would not be disclosed to the parties. Having seen the document, we can confirm that it was written by a Barrister and contains advice from him in connection with Crown Court (Family Division) proceedings which related to Mr Kitchener's granddaughter. It is a long standing principle of English law that no-one can be compelled to disclose advice received from a lawyer in connection with court proceedings. It is quite clear that this document falls within that category, and that the Council could successfully maintain a claim to legal professional privilege if asked to disclose the advice in any legal proceedings.

11. The information sought clearly falls within the exemption in Section 42 of the Freedom of Information Act. We therefore have to carry out the balancing exercise called for by section 2(2)(b).

Arguments in favour of disclosure

12. We considered first the arguments that support the public interest in disclosure. Mr Kitchener set out two specific reasons in his notice of appeal. Firstly, he referred to a "legal precedent created by the Attorney General". We take it that this refers to the widely reported question of whether the Government should disclose the Attorney General's legal advice on the legality of the war in Iraq. A complaint was made to the Information Commissioner that the Government had refused to disclose this advice and the Commissioner subsequently issued an Enforcement Notice on 22nd May 2006 requiring disclosure of the recorded information which led to, or supported, the concluded views which the Attorney General had made public. In doing so, the Commissioner noted that the case was "a highly exceptional case from almost every perspective. ... the Commissioner does not believe that wider precedent implications can, or should, be deduced from these conclusions". It is clear that, in law, each request for disclosure of information must be considered by the Commissioner on its merits, against the framework of the Act and that his decision in one case is not binding in another in any event. Neither is the decision of one tribunal, considering a particular request, binding on another tribunal, considering a different request. Of course, where the Commissioner or tribunals are considering requests which arise in similar circumstances, it may be expected that similar decisions will follow. The circumstances of Mr Kitchener's request for a Barrister's advice given in connection with care proceedings are very far removed from a request to see the Attorney General's advice on the legality of the war in Iraq. In reaching our decision on Mr Kitchener's case, we are not assisted by considering the decision in the Attorney General's. Neither was the Commissioner.
13. Secondly, Mr Kitchener states that under the Freedom of Information Act "any doubt or presumption should be in favour of the applicant and that any presumption must be in favour of disclosure". The Act does not expressly state this in terms, but it follows from the wording of Section 2(2)(b) that if the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information, the information should be disclosed. If the two competing public interests are equally balanced, then the public interest in maintaining the exemption does not outweigh the public interest in

disclosing the information, and therefore the information should be disclosed. Before considering where the balance falls in this case, we went on to consider other arguments that could be put forward in favour of the public interest in disclosing the information requested. Mr Kitchener clearly, and understandably, is concerned to find out the circumstances in which care proceedings involving a member of his family were taken. Providing the information will inform him and assist him to understand how and why such an important decision was made.

14. More generally, providing the information may help Mr Kitchener, and others, form a view of whether the Council are acting properly and responsibly in similar care proceedings; or, alternatively of course, it might indicate that the proceedings were improperly initiated. Either way, it seems to us there is a public interest in ensuring that the activities of public authorities are known, and can be called to account if appropriate.
15. More generally, the Council state that the Barrister's advice helped form their general policy on such matters: that that policy is still current and applied from time to time as the need arises. We agree with the Information Commissioner that "there is therefore a strong argument that a policy which is currently being operated should be divulged by the Council in order that its decisions may be scrutinised and that it may be made accountable for its actions. The reasoning employed to inform such a policy should also, in general, be made public. Knowing the reasoning behind a decision would allow the public to scrutinise the Council's actions and decisions from a point of understanding, which will in turn build public confidence in the Council's decision making."

Arguments in favour of exemption

16. If those arguments support the public interest in disclosing the information, what are the arguments that suggest the public interest lies in maintaining the exemption? To answer that, we have to set out, briefly, the reasons why the doctrine of legal professional privilege has evolved. Legal systems which recognise the importance of a fair trial, recognise that an inherent part of a fair trial is access to legal advice and representation for those involved in litigation. If either the lawyer or the client could be forced to disclose what either said to the other (whether orally or in writing) as part of that process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there was a possibility that disclosure might later be ordered; disclosure might undermine the whole basis of the client's position. Nor could the lawyer frankly advise the client if there was a risk of subsequent disclosure since disclosure might then undermine the client's position. In a recent case in the House of Lords *R (Morgan Grenville & Co Ltd) v Special Commissioners of Income Tax* [2003] 1AC563 at 606H-607B Lord Hoffmann observed:

"Legal professional privilege is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the advisor without fear that they may afterwards be disclosed and used to his prejudice ...legal

professional privilege has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by Article 8 of the Convention ... “

17. This is a powerful argument: indeed, to a lawyer, it may appear surprising that Parliament did not make information covered by legal professional privilege an absolute exemption under the Act, rather than a qualified exemption, subject to the balancing test of where the public interest lies. Given that Parliament has not made it an absolute exemption, we should be careful not to effectively make it an absolute exemption, simply because of the force of the public interest in maintaining the exemption. Clearly, there must be circumstances where the arguments in favour of maintaining the exemption, however powerful, can be outweighed by the public interest in favour of disclosure. The Information Commissioner considered that the circumstances surrounding the Attorney General’s advice on the legality of the Iraq war constituted, exceptionally, one such case, although he concluded “that the arguments for maintaining the exemptions are sufficiently powerful that the balance of competing public interest does not require the disclosure of those parts of the recorded information which were of a preliminary, provisional or tentative nature or which may reveal legal risks, reservations, or possible counter-argument.” There is a decision of this tribunal, *Kirkaldie v Information Commissioner*, (appeal number EA/2006/001) in which disclosure of a Barrister’s advice was ordered because the council to whom it was given had already disclosed part of the advice at a public meeting. They were therefore taken to have waived the claim to privilege and could not rely on it further. It therefore fell outside the exemption in section 42. In another tribunal decision involving legal advice, *Bellamy v Information Commissioner and the Secretary of State for Trade and Industry* (Appeal Number EA/2005/0023) the tribunal found that the public interest in maintaining the exemption outweighed the public interest in disclosure. We mention these two earlier decisions of the tribunal not because they create precedents, or are binding on us, but simply because they illustrate the approach of the tribunal in the different circumstances of particular cases.

The circumstances of the case

18. Parliament has said, in Section 2(2)(b), that we should consider the balance for and against disclosure “in all the circumstances of the case.” Amongst the circumstances which we have particularly considered here are the fact that the Barrister’s advice is still relatively recent. We do not know its exact date, but it is clear that it was written some time after 1999. Secondly, the Council maintain (and this has not been challenged by either of the other parties), that the advice “is regularly reviewed in the course of day to day considerations of the Council in the areas of child protection and looking after children,” and “the information was created for the purpose of providing legal advice in dealing with the complaint, and setting corporate policy. That policy was not spent as the policy is still enforced.” To that extent, the advice is still current. Thirdly, care proceedings were subsequently taken and to some extent, therefore, the issues covered in the advice were ventilated in court and were the subject of a judgement in the Family Court.

19. Some of the circumstances put forward by the Council for our consideration we do not regard as particularly relevant. They point out that the Barrister's advice may still be relevant "to potential legal proceedings, in so far as the limitation period for commencing legal action based upon the information detailed has not expired". We do not for a moment express a view on whether disclosing the Barrister's advice could or would give rise to legal proceedings; but supposing that it could, that seems to us, if anything, an argument in favour of disclosure, since as we said earlier, it is in the public interest that public authorities should be able to be called to account, where appropriate. Secondly, the Council refer to the "absence of contextual balance" if the Barrister's advice alone is disclosed without its background. It is of course open to the Council, if they wish to, to disclose further information to supply the necessary contextual background: that is a matter for them. Lastly, the Council referred to Mr Kitchener's dissatisfaction with their decisions, and to challenges to those decisions he has made through the courts and the ombudsman. Again, that seems to us neither here nor there: if there are grounds for legal action that would seem to support the public interest in disclosure, as we have set out above.

The public interest and our conclusion

20. Where then, does the balance lie? Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information? It seems to us quite clear in this case that the public interest lies in maintaining the exemption. We recognise that there is a strong public interest in favour of disclosure, but the arguments set out above in favour of maintaining the confidentiality of information subject to legal professional privilege seem to us not merely of equivalent weight but much stronger. In our view, the Information Commissioner came to the correct decision. There is no obligation under the Freedom of Information Act on the Council to disclose the contents of the Barrister's advice which they received. The appeal is dismissed.

Signed

20th December 2006

Humphrey Forrest
Deputy Chairman