HM Courts & Tribunals Service

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

GENERAL REGULATORY CHAMBER Case No. EA/2010/0206
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50281705
Dated: 7 December 2010

Appellant: Mr M. P. King

Respondent: Information Commissioner

Heard at: HM Courts & Tribunals Service, 45 Bedford Square,
London WC1B 3DN

Before

David Marks QC

and

Pieter De Waal
Narendra Makanji

DECISION

The Tribunal dismisses the appeal of the Appellant in respect of the Decision Notice dated 7 December 2010 and deletes paragraphs 18-30 inclusive of the said Notice replacing the said paragraphs with the following paragraph, namely:

"The Commissioner is satisfied that the Tribunal has not and has never held the information requested in the Appellant's request."

REASONS FOR DECISION

General

1. This somewhat unusual appeal concerns the consequences of an event which it is to be hoped is a rare event in this jurisdiction, namely the inadvertent disclosure of what is commonly called the disputed information. The Tribunal by the then responsible Deputy Chair ordered the information in question to be returned to the public authority under the Tribunal's then rules, namely the Information Tribunal (Enforcement Appeals) Rules 2005 (the Rules). Those Rules have now been superseded by the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009, but nothing turns on that change.

2. The Appellant is the party who made the relevant request and did so following upon the Deputy Chair's order. In effect the request was for advice, whether given by what was called a professional legal adviser or not to the Tribunal relating to that order. The conduct of this appeal has to some extent been bedevilled by some confusion that has been engaged in by a number of parties in relation to the distinction between the order made by the Deputy Chair (which is clearly the subject of the Appellant's request) on the one hand and on the other an application or

possibly two applications in respect of the order itself made by the public authority involved, namely the Department of Works and Pensions (DWP).

3. The matter was initially passed to the Tribunals Service. The relevant public authority for the purposes of this appeal, ie the public authority to which the Tribunal Service is attached is the Ministry of Justice (MoJ). The MoJ informed the Appellant that it did not hold the information requested. It added that a search had not identified any documents of advice regarding the Deputy Chair's order given to the Tribunal "by any professional or non-professional advisors". Subsequently, the MoJ again confirmed, this time in writing, that the requested information was not held adding that it was never asked to give advice to the Tribunal or to the Deputy Chair in any way that related to the order.

4. In due course, for reasons which will be set out in further detail below, in his Decision Notice, the Information Commissioner (the Commissioner) accepted that the applications made by the public authority, ie the DWP which was involved in the original substantive hearing (and for this purpose the DWP can be referred to as the Additional Party) and which prompted not the Deputy Chair's order but the application leading to the said order did "represent":

   "…advice given by a professional or legal adviser to the Tribunal concerning the issue of the order made on 3 December 2007 by the Tribunal under … the Rules".

5. Pausing here, it can be seen that the above paragraph reflects the mistake referred to above in paragraph 2, namely that the Decision Notice on its face appears to address the application leading to the making of the order and not, as the request itself was doing, addressing the order itself. Nonetheless the Commissioner determined that the advice which he had found had formed part of the application, constituted information that would be "captured" by the terms of the request.

6. On this erroneous basis the Commissioner then went on to examine the information and came to the conclusion that the information in question constituted personal data within the meaning and ambit of section 40(1) of the Freedom of Information Act 2000 (FOIA). He concluded that the information as requested was in the result exempt from disclosure under that section.

7. The appeal is effectively against the findings set out in the preceding paragraph. In the wake of the appeal the Commissioner has accepted that his findings in the Decision Notice are incorrect. However, in the Tribunal's clear view, he appears to have persisted in the earlier misconception that the request was addressed to the application or applications that preceded the order as distinct from the order itself. This continued misconception can be seen in paragraph 14 of his written submissions of 13 May 2011 which for the sake of completeness should be set out at this point, namely:

"Specifically, the 3 December 2007 [sic] is <u>not</u> on any reading <u>advice given to the Tribunal</u> (whether by a legal professional or otherwise) relating to the order made on 3 December 2007 under rule 14(1) of the 2005 Rules. Both the 3 December 2007 and the 18 December 2007 applications, are applications made by one party to proceedings for an order to be made by the Tribunal. There are no more "advice given to the Tribunal" that these submissions are."(Emphasis in original)

8. The Commissioner in his written submissions continues with the contention that neither of the two applications as distinct from the order itself made by the Deputy Chair "fall within the scope of the Appellant's request".

9. It is regrettable that the Commissioner has persisted in the underlying error in this matter. It has caused, if nothing else, the Appellant to embark on submissions which are not only lengthy, but also to a large extent, wholly immaterial to the proper resolution of this appeal. The fact remains, however, that the Tribunal is entirely satisfied that as a

matter of general principle the order made by the Deputy Chair was not and could not have been the subject of anterior legal advice, whether professional or otherwise, coupled with the overall assurance since given by the MoJ that no evidence to suggest that the Deputy Chair's order was in any way preceded by or subject to legal advice in the way suggested by the request.

The facts

10. By a decision promulgated on 20 March 2008 under appeal number EA/2007/0085 following an oral hearing, the Tribunal allowed in part an appeal by the Appellant against a Decision Notice by the Commissioner dated 14 August 2007 (Reference No. FS50140350). This appeal involved the original public authority which is referred to in the introductory part of this Judgment, namely the DWP. The background to the appeal can be seen from the Tribunal's Decision and need no longer be referred to for present purposes.

11. The Tribunal by its decision amended the Commissioner's previous Decision Notice. In general terms it confirmed that while much of the information which had been withheld by the DWP, being the subject of the earlier request by the Appellant, fell outside the Appellant's request, some of the information withheld did fall within the scope of the request. The terms of the amended Notice went on to confirm that a particular qualified exemption in FOIA was engaged and the balance of public interests lay in withholding the information. It followed that the DWP as the Additional Party needed to take no further steps.

12. It appears that in the course of the above proceedings, the information requested which had already been described in this judgment as the disputed information, was inadvertently disclosed to the Appellant. By an order dated 3 December 2007 as indicated above the Deputy Chair in question made an order under rule 14(1) of the Rules (which again need not be recited fully here) for a return of that information to the DWP as a result of an application made to that effect by the DWP itself.

13. By a written request dated 14 August 2008, the Appellant wrote to the Knowledge and Information Officer, Access Rights Unit, at the MoJ which dealt in effect with two requests. The first is not of any concern in the present appeal since it does not feature in the Appellant's Notice of Appeal. This led, however, the Appellant to address a particular Awareness Guidance published by the Commissioner's Office which dealt with and addressed the extent and meaning of legal professional privilege. This led the Appellant to write in the following terms in this letter, namely:

"Consequently communications between the Ministry of Justice's lawyer and his client, in this case the Information Tribunal, may be privileged, but communications which were between a non-professional legal adviser and the Information Tribunal will not be privileged. Therefore, I must now ask for copies of any advice given by any non-professional legal adviser to the Information Tribunal concerning [the Deputy Chair's] order made under Rule 14(1) of the Information Tribunal (Enforcement Appeals) Rule 205 of 3rd December 2007. My request for this information is being made under the Freedom of Information Act 2000."

14. The letter went on to refer yet again to the Awareness Guidance and its particular reference to privilege prompting the Appellant to reiterate the request which is cited above in the following terms, namely:

"Therefore I must now ask for copies of any advice given by any professional legal adviser to the Information Tribunal relating to the proper or improper issue, ie in accordance with Rule 14 of the [Rules] of [the Deputy Chair's] order of 3rd December 2007. My request for this information is being made under the Freedom of Information Act 2000."

This last cited paragraph does no more than repeat the terms of the request which are articulated and cited above in paragraph 13. The only distinction is that the request cited in paragraph 13 refers to advice given by what the Appellant called a "non-professional adviser" whilst

the quoted passage set out immediately above refers to what he calls advice by a "professional legal adviser".

15. Pausing here the Tribunal is firmly of the view that with regard to this request, the Appellant was subject to a fundamental misconception on any basis, with regard to the order made by the Deputy Chair on 3 December 2007. The Deputy Chair was acting in a judicial capacity. As a matter of common sense, let alone as a matter of basic principle, it would be utterly improper if not totally nonsensical for any legal adviser whether non-professional or otherwise to give a Deputy Chair any advice with regard to the precise function she was in fact carrying out, namely making an order on the facts of this case within the context of the Tribunal's own rules and procedure. That is the job the Deputy Chair was charged with. There would be no warrant for a judicially appointed chair person being in receipt of legal advice, either from a Ministry of Justice lawyer or from some other so called non-professional lawyer. Such is the only response that the request or requests quoted above are capable of generating.

16. In the Tribunal's judgment irrespective of the matters which will be addressed below the above conclusion is enough without more to dispose of this appeal.

17. Part of the continuing difficulty in the wake of the Appellant's request would appear to stem from an earlier request that had been made as indicated above, which is not the subject of the present appeal. prompted the MoJ, and to some extent the Commissioner, to regard the full ambit of the Appellant's request to be for what were called legal discussions between lawyers and officials on the legal powers and options available to MoJ to request the information back from the Appellant after it was mistakenly disclosed by the Commissioner to him. The MoJ had overall regarded both sets of requests made by the Appellant as invoking section 42 of FOIA which deals with legal professional privilege. To some extent the nettle was grasped by the Commissioner in a letter of 24 July 2007 to the MoJ. In that letter with

regard to the two connected requests which form the basis of this appeal, the MoJ was specifically asked as to whether it held relevant information being asked in particular to set out the nature of the records that corresponded with each request and asking the MoJ to specify, if it thought it appropriate, which exemption or exemptions applied. In a reply sent by MoJ to the Commissioner's office on 15 October 2009 the following passage appears, namely:

"At the internal review stage of the case Mr King was informed that we held some information which related to his request, although it was not exactly what he asked form. The Ministry of Justice informed Mr King that this information has been judged to be exempt from disclosure under section 42 of [FOIA] legal professional privilege. I have revisited this information and I can confirm that it falls outside the scope of Mr King's request. The information referred to consists of emails between DWP and MoJ lawyers regarding the disclosure and the [sic] how DWP (as a party) should respond. At no stage do these emails go to, or inform the Information Tribunal. These emails are not, therefore, legal advice given to the Information Tribunal regarding the power of the Tribunal on 3 December 2007 to issue an order, nor do they provide answers to any of the [FOIA] questions Mr King asks. I hope that, having received the above explanation, you no longer consider it necessary to view this information. However, if that is not the case, I regret that we are not prepared to disclose it to you in any event. The information constitutes internal Government legal advice on the application of FOIA, and we do not consider that it is appropriate for such information to be shared with the Information Commissioner. This is, in our view, recognised by section 51(5) of [FOIA] which restricts your ability to issue an information notice in respect of this information. We are, of course, more than happy to discuss further any residual concerns that you may have about whether or not the information is within the scope of the request."

18. Pausing here again the Tribunal is entirely satisfied that on the basis of that response quite apart from the question of principle which the Tribunal has addressed in paragraph 16 above, there is no justification for suggesting that any information of the type covered by the present request forming the basis of this appeal has ever been imparted to or held by the Tribunal let alone by the Deputy Chair.

19. The position was made abundantly clear in the Tribunal's judgment by a subsequent letter dated 24 November 2009 dealing specifically with the two connected requests which form the basis of this appeal. After setting out those requests in express terms the letter goes on as follows, namely:

> "I have concluded my investigations and confirm that the Ministry of Justice does not hold the information you are seeking. Extensive searches have been conducted within the Department and we cannot identify any documents of advice regarding Rule 14 of the [Rules] of [The Deputy Chair's] order of 03 December 2007, given to the tribunal by any professional or non-professional advisors."

The Decision Notice

20. Reference has already been made to the Decision Notice in this case. Given the unfortunate misunderstandings that have crept into this appeal it is perhaps important to set out the relevant passages in full, namely:

> "16. The Tribunal has argued that the DWP's representations, referred to in paragraph 15 above are not covered by the scope of the request. This is because the representations are not advised from the MoJ to the official referred to in the complainant's request.
>
> 17. In contrast, however, the Commissioner considers that the request was not limited to advice from the MoJ to a certain official. Rather it asks for copies of advice given to the Tribunal by any legal

adviser, whether professional or non-professional, in connection with an order made on 3 December 2007.

18. The representations from the DWP constitute two applications for a direction from the Tribunal under 14(1) of the Rules. These applications are dated 3 December 2007 and 18 December 2007.

19. The Commissioner considers that the later application does not concern the order made on 3 December 2007 by the Tribunal under 14(1) of the Rules. He has therefore dismissed this information from the scope of his considerations.

20. However, the Commissioner is satisfied that the DWP's application of 3 December 2007 represents advice given by a professional legal adviser to the Tribunal concerning the issue of the order made on 3 December 2007 by the Tribunal under 14(1) of the Rules. The Commissioner has therefore determined that this information would be captured by the terms of the request.

21. The Commissioner has gone on to analyse this information as part of his Decision, the findings of which are set out below."

21. It is clear from the earlier part of this judgment that the Tribunal takes the view that paragraph 20 is entirely inappropriate and should be deleted and replaced by a paragraph set out in the terms of the order at the outset of this Decision. Given the answer provided by the MoJ in express terms the Commissioner should have found and accepted that no advice of any sort whether or not of the type referred to in the requests was ever given by either a so called non-professional or even professional legal adviser to the Tribunal regarding the order that was made by the Deputy Judge. It follows that the discussion which follows on from paragraph 21 in the Decision Notice in paragraphs 22-30 inclusive should be deleted and the order at the outset of the Decision so provides.

<u>The notice of appeal</u>

22. The notice of appeal is dated 29 December 2010. The Tribunal does not intend any disrespect to the Appellant in any way whatsoever by failing to quote from the fairly extensive grounds of appeal in express terms. The Appellant can to perhaps be excused for embarking on an extensive analysis of the issue as to what extent the various provisions of FOIA are engaged given the passages just referred to in the Decision Notice. The same excuse can perhaps be made with regard to equally extensive submissions made in support of his appeal received in the period leading up to the appeal under cover of an email from the Tribunal dated 13 May 2007. Regrettably those submissions which are described as a "Written Submission" are somewhat prolix and difficult to understand, coupled with the fact that the pages or sections are unnumbered especially towards the end of the document with no clear thread running through the document as to how the same is intended to be organised.

23. Nonetheless, the fact remains that the thrust of both the grounds of appeal and the written submissions are entirely misconceived addressed as they are to considering whether and to what extent section 40 applies in circumstances where as the Tribunal has decided, those provisions do not apply at all given the factual basis as set out in the MoJ's letter of 24 November 2009.

Conclusion

24. For all the above reasons the Tribunal dismisses the appeal and in the manner articulated at the outset of this Decision upholds the Decision of the Commissioner on the grounds different to those articulated and set out in the Decision Notice.

signed

David Marks QC
Tribunal Judge

Date 27 May 2011