Information Tribunal appeal number: EA/2010/0185
Information Commissioner's reference: FS50304683

Determination on papers.

On: 25th. July, 2011

Decision Promulgated on: 31st. August, 2011

BEFORE

David Farrer Q.C.

and

Dave Sivers and Suzanne Cosgrave

Between

MATTHEW DAVIS

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

BOARD OF TRUSTEES OF TATE GALLERY

Second Respondent

FOIA s. 42. Legal professional privilege – factors relevant to the balance of public interests.

Cases: ***Bellamy v Information Commissioner and the Secretary of State for Trade & Industry*** **EA/2005/0023;** ***DBERR v Dermod O'Brien*** **[2009] EWHC 164 (QB);.*****Calland v Information Commissioner and F.S.A. EA/2007/0136; Mersey Tunnel Users Association v I.C and Merseytravel EA/2007/0052; Foreign and Commonwealth Office v Information Commissioner EA/2007/0092***

Decision

1 This appeal is dismissed.

Background

2 The Second Respondent ("Tate Modern") held an exhibition between 1st. October, 2009 and 17th. January, 2010 entitled "Pop Life – Art in a material world". It was intended to include a photograph of Brooke Shields, aged ten, naked, entitled "The Spirit of America".

3. A press statement was issued, explaining the history of the photograph and its artistic context.

4. Legal advice was taken by Tate Modern from its senior internal legal adviser, who consulted well – known external solicitors and a member of the independent bar, as to the possible relevance of the Protection of Children Act, 1978 ("the 1978 Act") to the display of that photograph. The advice was contained in three e mails dated 28th and 29th September, 2009. Advice had been given to the Tate previously, in February 2008, by the Tate's lawyers in the form of a general legal note on the 1978 Act.

5. The photograph was shown at the press preview following receipt of such advice, whereupon the Metropolitan Police notified Tate Modern that a prosecution under the 1978 Act might ensue, if the photograph were not withdrawn.

6. The Tate withdrew it, issuing a press statement setting out its position. It did not disclose to any third party what legal advice it had received.

7. These events aroused widespread interest and debate in the media and among those concerned with and about artistic freedom, issues of censorship and abuse of children.

8. The photograph had previously been displayed in the USA and elsewhere in Europe, without the threat of criminal sanction.

<u>The Request and the response</u>.

9. On 23rd. December, 2009, the Appellant, a journalist, made a request for copies of:-

   "all correspondence you hold (both sent and received, e- mail and letters) in relation to the Tate Modern seeking legal advice from lawyers about the potential legality or not of displaying the Brooke Shields photograph in the gallery"

   He expressly limited this request to correspondence with lawyers predating the withdrawal of the photograph from the exhibition.

10. On 21st. January, 2010, Tate Modern refused the Request in its entirety, asserting that the information was exempt by virtue of FOIA

s.42(1) and that the public interest favoured the maintenance of that exemption.

11. The Appellant requested an internal review on 28th. January, 2010. The refusal based on s.42(1) was upheld and reliance was further placed on s.41. That reliance was later abandoned and the Request was later amended to omit the identities of advising lawyers, thus obviating the need for consideration of s.40.

The Complaint to the Commissioner

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12. The Appellant complained to the Commissioner (the "ICO") on 28th. March, 2010. The ICO obtained from Tate Modern the information withheld together with its relevant press releases. It was plain that large parts of the legal advice provided, namely the text of the relevant statute and notes as to its meaning and scope, were either not privileged or so general in application as to require no assertion of privilege. Those parts were disclosed to the Appellant, leaving in issue only those parts which dealt specifically with the applicability of the 1978 Act to the Brooke Shield photograph.

13. The ICO, by a Decision Notice dated 30th. September, 2010, upheld the refusal to provide the requested information. His reasons and the authorities on which he relied, are dealt with in the review of issues and submissions which follows.

Decision

14. All agree that the information withheld is subject to legal professional privilege, hence that s.42(1) is engaged. The issue is, therefore, whether the Respondents have made good the claim that the public interest in maintaining the exemption should prevail.

15. The relevant jurisprudence of the Tribunal and higher courts provides unambiguous guidance.

16. Bellamy v Information Commissioner and the Secretary of State for Trade & Industry EA/2005/0023 established the subsequently unchallenged principle that -

"there is a strong element of public interest inbuilt into the privilege itself" (35)

- arising from the need to promote frank and complete exchanges of view between clients and their lawyers.

17. Since s.42(1) provides only a qualified exemption, it is plain that, in some circumstances, the public interest in disclosure will nevertheless predominate. A rare example of the interest in disclosure proving stronger (or at least equal to) the interest in maintaining the exemption is *Mersey Tunnel Users Association v I.C and Merseytravel EA/2007/0052.* In that case the advice had been given about ten years before the request; very large numbers of people were affected and considerable public funds involved.

18. Another situation which might demand the disclosure of advice is one in which there is reason to think that such advice has been misrepresented or unjustifiably disregarded by the authority concerned[1].

19. The *Bellamy* principle leads to a requirement that any countervailing interest must be *"clear, compelling and specific"*[2].

20. Where a public authority, such as Tate Modern, is tackling aesthetic issues which may impinge on sensitive questions of morality and the

[1] See *Foreign and Commonwealth Office v Information Commissioner EA/2007/0092 at para. 29*
[2] See *Calland v Information Commissioner and F.S.A. EA/2007/0136*

criminal law – and doing so, to some extent, at public expense – there is a legitimate public interest in transparency which may go beyond the invariable unspecific interest which can always be invoked in answer to the assertion of a qualified exemption. This needs to be compelling if it is to override the interest in confidentiality based on the lawyer – client relationship?

21. The submissions made on both sides are simple and straightforward.

22. Both Respondents contend that there is no feature of this request which justifies overriding the inbuilt interest in respecting legal professional privilege. None of the examples identified in the authorities cited above apply. On the contrary, that inbuilt interest is especially strong here because the advice relates to a risk of prosecution, not simply of a legal structure but of individual trustees. Moreover, the advice was given only three months before the Request was made. The issue to which it related was very much alive. There was no basis for suggesting that this was a case in which the public was being misled or sound advice wilfully ignored.

23. In his Grounds for Appeal, Reply to the ICO and his "Final Argument", the Appellant sets out a range of arguments designed to show that this is an exceptional case hence that the balance of interests favours disclosure.

24. He rightly points out that the inclination to disclosure which underpins FOIA applies to s.40 as to other qualified exemptions, which means that a perfect balance of interests results in disclosure.

25. He argues that examples of the countervailing interests given in other appeals, which may outweigh legal professional privilege are to be found here.

26. Having initially apparently and, with respect, unwarrantably assumed that the advice obtained *"appears to set the Gallery at odds with the law of the land and almost leads them into committing an offence under*

child pornography laws", he advanced a more comprehensive argument in his reply, designed to show that there was a public interest in seeing the advice whatever its conclusion – that is to say whether it said "Yes – display will amount to an offence", "No, no offence committed" or "Maybe – there are arguments both ways".

27. The flaw common to each branch of the argument is the assumption that display would have amounted to an offence. That was the untested view of the Metropolitan Police, but no court was called upon to decide the matter. The police may have been wrong, regardless of the content of the advice received by Tate Modern.

28. Moreover, even if the display of the photograph had undeniably constituted an offence, the only one of these hypothetical cases which might or might not involve clearly foolish and irresponsible conduct by the trustees is the first – where they appear to act against advice. The other cases would reveal only that lawyers had given advice with which a judge or possibly a jury disagreed or had concluded that the outcome was not easily predictable. Such cases are commonplace and frequently reflect no discredit whatever on the adviser, still less on the client. There is no public interest in identifying them.

29. We do not consider that any weighty interest has been advanced by the Appellant to justify disclosure of privileged material relating to a highly sensitive current issue involving, when the advice was given, the possibility of prosecution.

30. For these reasons we uphold the Decision Notice and dismiss this appeal.

Signed

David Farrer Q.C.
Tribunal Judge

Dated: 31st August, 2011