IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2011/0279

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50383109
Dated: 1 November 2011

Appellant: **Mr James Pragnell**

Respondent: **The Information Commissioner**

2nd Respondent: **The Ministry of Justice**

Heard at: The Competition Appeal Tribunal, Victoria House, WC1A 2EB

Date of Hearing: **11 June 2012**

Before

C Hughes

Judge

and

Suzanne Cosgrave and **Steve Shaw**

Tribunal Members

Date of Decision: **20 June 2012**

Attendances:

For the Appellant: in person

For the Respondent: Robin Hopkins

For the 2nd Respondent: Oliver Sanders

Subject matter:

Formulation of government policy s35, Legal professional privilege s42 Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 1 November 2011 and dismisses the appeal.

REASONS FOR DECISION

1. We have decided that the exemptions under s35(1)(a) and s 42 of the Freedom of Information Act ("FOIA") were correctly applied when the Appellant was refused information about policy formulation and development in connection with the provisions of the Constitutional Reform and Governance Act 2010 amending FOIA with respect to the Royal Household. This Act received Royal Assent on 8 April 2010 shortly before the dissolution of Parliament and the General Election. Among its provisions were changes to s37(1)(a) and related sections of FOIA making absolute rather than qualified the exemption for communications with the Sovereign and certain other persons and maintaining this absolute exemption for a period of time once they became historical records.

The request for information

2. On 17 June 2010 the Appellant sought information for the Ministry of Justice (the Second Respondent, "MoJ") concerning the amendments to FOIA. He requested a copy of the revised wording of the act (which was provided) and also:-

   "Any Government paper that states who proposed the change, discusses the reason(s) for the change and/or recommended that the change be made."

3. This request was refused on 3 September 2010 on the grounds of cost (s12 (1) FOIA).

4. On 4 September 2010 he made a further request:-

   "Please provide copies of the final versions of advice to Ministers and final papers for ministerial meetings in relation to exemptions from the FOI Act 2000 for communications with the Royal Family and Royal Household."

5. This request was considered to be a request for information recorded before Royal Assent to the legislation on 8 April 2010 (i.e. it was a request for the Ministerial papers of the outgoing administration) and the Appellant, the Information Commissioner and the Tribunal accepted this interpretation. The request was refused by a letter dated 29 October 2010 on the grounds of exemptions in s 35(1)(a) and (b) (formulation of policy, ministerial communications), s 37(1)(a) (communications with the Royal Household), s 41(1) (information provided in confidence and s 42(1) (legal professional privilege). On the following day the Appellant requested an internal

review. The MoJ responded on 3 March 2011 upholding the earlier refusal but providing the speaking notes for the Secretary of State in moving the amendments in the House of Commons and the "lines to take" i.e. advice to him in dealing with questions on the issue.

6. The appellant had in subsequent exchanges sought to refine his requests, reducing it at one stage to three questions. However, at the hearing he confirmed his wish to have all such information as outlined in his original request. The role of the Tribunal under s58 of FOIA is to review the Decision Notice and hence the request under consideration as described by the Commissioner that decision notice, i.e. the request of 17 June 2010.

The complaint to the Information Commissioner

7. Mr Pragnell complained to the Information Commissioner on 26 March 2011. Following an investigation the Commissioner issued a decision notice on 1 November 2011 finding that s35(1)(a) and s42(1) were engaged and upholding the reliance by the MoJ on those provisions. Mr Pragnell appealed on 22 November 2011.

The appeal to the Tribunal

8. In his appeal he argued that at the time of his request CRAG had received Royal Assent, by the time he requested an internal review a period of six months had elapsed and the MoJ responded with the outcome of its internal review in March 2011, seven weeks after the commencement of those provisions of CRAG, therefore;-

    - "I find it very difficult to believe that government policy continued to be formulated and developed after CRAG received Royal Assent…"
    - After the commencement.. "all formulation and development of CRAG had ceased, which means that the information was no longer exempt information under s35(1)(a).
    - He had been flexible in how the information should be communicated to him and therefore would have accepted a letter setting out the answers to his specific questions, and therefore any "chilling effect" would be avoided since sensitive matters could be excluded,

- He considered the date of final refusal (3 March 2011) as the relevant date for determining the public interest, but even if an earlier date was chosen "safe space" should be given little weight since any policy making process had "become merely administrative",
- He argued that the Commissioner did not give sufficient weight to the arguments for disclosure in striking the balance under s35(1)(a).
- He did not accept that discussions with the Royal Household were necessarily sensitive,
- With respect to s.42(1) (legal advice) he argued that the advice was no longer live when he made his request.

9. In his response the Commissioner re-affirmed his position as set out in his decision notice. With respect to the timing of the request and the state of formulation of government policy he emphasised the importance of the change of government between the passing of CRAG and its commencement. He had considered the Appellant's desire for answers to specific questions and had considered whether they could be addressed without engaging the exemptions but he had concluded in paragraph 41 of his DN that "in essence the factual details are embedded in more detailed information". He considered that the arguments with respect to discussions with the Royal Household were not relevant to his determination.

10. The MoJ agreed with the Commissioner's arguments, feeling that more weight should be given to the "chilling effect" than the Commissioner had, and also reaffirmed its view that a number of other exemptions were also engaged.

11. The Commissioner did not have full access to the disputed information as the MoJ had invoked s 51 (5) in respect of documents which contained or related to legal advice "with respect to his obligations, liabilities or rights under this Act".

12. Additional disputed information was provided to the Tribunal which had been withheld from the Commissioner, this comprised sections of documents already provided as the disputed information and for which the exemption s35(1) was being claimed.

The questions for the Tribunal

13. The key questions before the Tribunal were

14. The date with respect to which the public interest test should be applied,

15. Whether at that date there was "formulation and development of public policy" and the legal advice was "live",

16. In the light of that date the weight that should be given to the exemptions under s35(1)(a) and s42(1),

17. The weight of public interest in the disclosure and how the balance should be struck,

18. Whether the engagement of other exemptions would affect the decision with respect to the public interest.

Evidence

19. In his submissions and evidence the Appellant reaffirmed his position that he wished for the answer to the original request in relation to the detail in the advice given to Ministers and in particular to three questions, who originated the idea of the changes, what were the arguments for and against the changes and who recommended the changes.

20. Jane Sigley, a civil servant who was head of FOI Policy and Strategy in the MOJ at the relevant time, gave evidence as to the process for the formulation and development of policy. Crucially she confirmed that the policy was under development after the arrival of new Ministers in May 2010 until the start of 2011 when the order for the commencement of the relevant provisions of CRAG was brought forward. The policy consideration was in the context of a wider package of measures concerned with increasing transparency. She argued that for three reasons the disclosure would seriously hinder and damage the policy-making process to the detriment of the overall public interest:-

    - The need to formulate policy within a safe space free from premature external scrutiny and pressure,
    - The adverse chilling effect on future policy formulation, and
    - The risk of discouraging the engagement of external stakeholders.

21. In particular she stated:-

> "Furthermore, I believe that our ability to put forward advice to coalition ministers after the 2010 general election would have been constrained by disclosure in this case. The development of this policy is somewhat unusual in that it spanned two administrations, requiring officials to advise a new set of Ministers on issues considered by a previous administration. This gives particular weight to considerations around the adverse effects of disclosure of advice provided to the previous administration when the new administration is actively considering the same policy. Inevitably a change of administration will involve the introduction of new ideas and perspectives. The principle of protecting the safe space within which policy is developed is therefore heightened in such circumstances.
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> In this instance, as officials formulating advice to ministers after the election, it was necessary for us to look critically at previous advice provided and the evidence on which it was based and to consider the nature of the advice and options needed to serve the priorities and objectives of the new administration. There will often be more than one rational policy response to a given situation and it may be entirely possible to use the evidence and information available to support a variety of policy options. Disclosure of the advice given to the previous administration at a time when advice on the same policy issues was being formulated for the new administration would have damaged the policy-making process, e.g. if an official found themselves defending why different advice was provided.
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> In addition, it is a long-standing convention that ministers and special advisers of a current administration should not normally have access to documents of a previous administration of a different political party, including policy advice provided to ministers. This convention helps maintain the impartiality of the civil service which serves each administration regardless of its political complexion. Furthermore it would not be appropriate for current ministers to have knowledge of the internal workings of the previous government."

22. In his evidence Sir Alexander Allan, a senior civil servant until October 2011, at the Cabinet Office addressed both the other exemptions which the MoJ relied upon and also his concerns with respect to the potential detriment to the public interest of giving inadequate weight to the impact of disclosure of the policy-making process. He noted

the importance of the confidentiality of Cabinet deliberations and ministerial communications as set out in the ministerial code. He stressed the importance of fully explaining government's decisions especially on controversial and constitutional matters;-

"However this must be balanced against the risk that exposing disagreements between different ministers would undermine the effective operation of government. If policy disagreements within government were to be revealed, it would be unable convincingly to put forward a united front and properly accept collective responsibility for its decision.

Disclosure of confidential ministerial discussions would also have a significant chilling effect on the policy-making process within government. If ministers or officials involved in the formulation or development of government policy were not confident that the privacy of their work and communications will be respected, they will inevitably be less candid and robust in their approach and more guarded and defensive. For example, if those involved are aware of the possibility of public disclosure a few years later, at which point they would very likely still be pursuing political careers, they will inevitably feel that they should keep in mind how their words might be read or portrayed in the media. This may in turn make them shy away from controversial areas, avoid frank criticisms of individuals or ideas, spend time framing things in more diplomatic language or divert attention towards the addition of qualifications or contextual points needed to pre-empt ill-informed or unjustified criticisms. All of this would be an unnecessary distraction and, more importantly, it would dilute the incisiveness and clarity of the internal deliberations and debate and so have an adverse impact on the quality of decision-making generally.

If ministers believe that their policy discussions with colleagues (or indeed with their officials) would be revealed publicly in the near future - in this case the request was made within a year or so of the relevant documents-the character of those discussions would change. If ministers cannot rely on their deliberations having a high level of protection against future disclosure, they may be reluctant to put forward openly and candidly dissenting views. They may express their views in a different way because of the likely reaction of the public, and maybe more guarded about what they say and less willing openly to debate difficult policy options. In my view this would be bad for the quality of decision-making."

Analysis

23. The starting point is the consideration of the relevant date for applying the public interest test. The tribunal is entirely satisfied that, as a matter of statutory construction, the relevant date is the date of the request. A public body receiving a request for information has to evaluate and respond to this request swiftly. The only date known with certainty is the date of request i.e. the date it is received and therefore that is the date at which the relevant test needs to be applied.

24. In this case, the majority of other dates which might be considered (e.g. the date when the public body first replied to the request, the date when the public body should have concluded its internal review) make no difference since on the evidence it is clear that the policy formulation and development process was on-going at the time of the request and until the commencement of the relevant provisions in January 2011.

25. The next substantial matter to be addressed is the weight that should be given to the exemption contained in s 35 (1) (a). It should be noted that the request on this occasion was specifically directed to the heart of government policy-making- the request specified explicitly that what was sought were papers considered by ministers. The evidence before the tribunal fully spelled out the short and long term problems created by disclosure in this case. It seems to the tribunal that the potential adverse impacts of disclosure are significant. Furthermore the tribunal considers that it is important to give proper weight to the constitutional conventions governing ministers in order to ensure that harm is not done to the proper processes of government. It should be noted that the Information Commissioner commented on the "genuinely free and frank nature" of the information which was the subject of this request. The tribunal considers that the disclosure so soon after the relevant decision-making of the ministerial papers would not be in the public interest as it would significantly harm the constitutional convention of Cabinet collective responsibility as well as harming the decision-making process in the ways indicated. There is a further area of significant concern. A disclosure of these documents would be a disclosure to all the world. The effect of this disclosure would be that documents which by constitutional convention should not be shown to ministers in a new administration would be freely available to them and in the context of release via a FOIA request being to the world at large they would be available to everyone else. This seems to the tribunal to be a

significant erosion of a constitutional convention and whilst the evidence was that the convention is not an absolute bar to such disclosure to ministers it is not the role of the tribunal to actively effect such constitutional change lightly i.e. without evidence of a significant public interest in the disclosure.

26. Within the scope of the request was in substantial amount of material which would also fall within the exemption with respect to the provision of legal advice, s42. There are substantial reasons of public policy why legal advice should not normally be disclosed. The Commissioner in his Decision made it clear he had not had sight of that material (para 45), the Tribunal had the opportunity to see and review that material.

27. Disclosure of this disputed material would clearly be of some value. It would increase the openness and transparency of government. However it seems to the tribunal that much of the information contained in the disputed material is already in the public domain; for example through ministerial statements and speeches in Parliament. Further material was disclosed to the Appellant in the form of the speaking notes for the Secretary of State and "lines to take" i.e. advice to a minister with respect to press enquiries. The amount of new information which the disclosure of the requested information would put into the public domain would be relatively restricted.

28. In the balance which has to be struck the tribunal has considered the public interest of greater transparency; however it is not satisfied that that is sufficient to outweigh substantial harms which would be done by the disclosure. In this case there was in effect a new policy review underway in which the issues facing the outgoing government in formulating legislation were promptly revisited by the incoming government in deciding whether or not to implement in its entirety the Act of Parliament passed in the dying days of the old administration. The new government had a commitment to significant changes relating to issues around transparency. In considering the legislative legacy of the old administration they could have taken any one of a number of routes. In the event they decided to commence the legislation as originally passed by Parliament; however this was by no means a foregone conclusion and on the evidence before the tribunal there was active consideration of this policy area for a substantial period of time. Disclosure of this material would have caused significant harm to the processes of government and the constitutional conventions

underpinning it. In this case there was not the slightest implication of any misconduct or illegality and therefore the balance of public interest was overwhelmingly in favour of non-disclosure. It is likely that the public interest in non-disclosure of this material will, for the reasons outlined above, remain substantial for a considerable period of time.

29. In the light of the very strong balance in favour of non-disclosure in relation to s 35(1) a and s42 (1), it was not necessary for the tribunal to analyse in detail the application of the other exemptions put forward by the MoJ; however it is clear that other exemptions identified by the MoJ are likely to have applied with considerable force to some at least of the documents contained within the request.

Conclusion and remedy

30. Accordingly the tribunal finds that the Commissioner did not err in law in finding that the public interest was that these documents should not be disclosed and the tribunal upholds the Commissioner's decision notice.

31. Our decision is unanimous

Judge Hughes
[Signed on original]

Date: 20 June 2012