

FOIA s.42 – Qualified exemption: legal professional privilege

Dr John Pugh MP v IC & Ministry of Defence

EA/2007/0055

17th December 2007

Cases:

Bellamy v IC and The Secretary of State for Trade and Industry [2006] UKIT EA_2005_0023

Shipton v IC and the National Assembly of Wales [2007] UKIT EA_2006_0028

Kitchener v IC and Derby City Council [2006] UKIT EA_2006_0044

Adlam v IC & HM Treasury [2007] UKIT EA_2006_0079

Gillingham v IC [2007] UKIT EA_2007_0028

Kessler QC v IC & HM Commissioners for Revenue and Customs [2007] UKIT EA_2007_0043

Facts

Dr Pugh MP on behalf of a constituent requested the legal advice obtained by government in relation to the effect of the two European Court of Justice (ECJ) decisions on the interpretation of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE). The constituent was a former employee of the Royal Ordnance Factory Organisation (ROFO) before his employment was transferred when it was privatised and sold. He believed that the ECJ decisions could affect his pension benefit, hence the request. The MoD did not obtain legal advice specifically on the effect of the decisions. However as a result of a previous communication in relation to the constituent's pension the MoD had obtained a legal opinion on the subject of the request after the first ECJ decision and therefore accepted the request as a valid request under s.1. The MoD refused to disclose the opinion as it considered the s.42 LPP exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

The IC's decision notice upheld the MoD's refusal.

Findings

s.42 Exemption

The Tribunal adopted the definition of 'Legal Professional Privilege' found in the case of *Bellamy* and found therefore that the exemption was engaged.

Public Interest Test

The MoD relying on *Bellamy* argued that there would need to be exceptional circumstances for the Tribunal to find the public interest favoured disclosure where the LPP exemption was engaged in a case.

The Tribunal found that with all exemptions under FOIA that the exemption itself will usually represent the principal public interest in maintaining the exemption and

therefore can be described as an “inherent” public interest in favour of maintaining the exemption. The Tribunal did not accept that there is any inbuilt ‘weight’ automatically applicable to qualified exemptions, whether class based or not. However in the case of the LLP exemption the weight of judicial opinion referred to in the case of *Bellamy* amongst others, gives the exemption itself greater weight and to that extent may be described as having an “inbuilt” weight requiring equally weighty public interests in favour of disclosure, if the exemption is not to be maintained.

The Tribunal therefore rejected the MoD’s argument, stating that ‘exceptional circumstance’ was not the correct test to be applied under FOIA. They held that the correct test is as set out under s.2(2)(b) FOIA, namely that “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.” This requires a consideration of the factors in favour of maintaining the exemption and those favouring disclosure and the weight to be attributed to the factors in the circumstances of the particular case in order determining where the balance lies. The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption.

Conclusion

The Tribunal found that balance of the public interest was closer than argued by the IC and MoD, but because the disputed information was only partially related to the request this weakened the public interest factors in favour of disclosure, and that the balance favoured maintaining the exemption and upholding the decision notice.