

**FOIA s.42** – Qualified exemption: legal professional privilege

**FOIA s.35(1)(a)** – Qualified exemption: formulation or development of government policy

## ***Martin Shipton v IC & National Assembly of Wales***

**EA/2006/0028**

**11th January 2007**

### **Cases:**

Three Rivers DC and ors v Governor and Company of the Bank of England (no 6) [2004]

UKHL 48

USP Strategies v London General Holdings Ltd [2004] EWHC 373 (Ch)

Bellamy v IC and The Secretary of State for Trade and Industry [2006] UKIT EA\_2005\_0023

### **Facts**

The Appellant requested the National Assembly of Wales (“the Assembly”) to disclose information about its consideration of whether a particular Labour Party manifesto promise to provide all primary school children with free breakfasts. The Assembly refused to provide the information and argued that it fell under ss.42 and 35 exemptions and their disclosure would be harmful to the public interest to an extent that it outweighed the public interest in disclosure.

The IC held that the ss.42 and 35 exemptions were engaged but that the public interest in maintaining the s.42 exemption did not outweigh the public interest in disclosure. The s.35 exemption was more finely balanced but the IC did not reach a concluded view on the point in view of his decision to refuse disclosure under section 42.

### **Findings**

#### **Section 42**

Both documents were privileged. It was not necessary, as the Appellant had contended that there should be a risk of litigation for the s.42 exemption to apply due to the decision in the case of *Three Rivers DC v Bank of England (No 6)*. As to the memorandum from the civil servant, in summarising the advice it set out the substance of that advice and therefore retained privilege (applying *USP Strategies v London General Holdings Ltd* ).

In considering the public interest test the Tribunal acknowledged that it had been said in the earlier Tribunal decision of *Bellamy* that there was “a strong element of public interest inbuilt into the privilege itself” and that “At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”. However, it also noted that the exemption was qualified, not absolute, and that there would therefore be occasions when the public interest in disclosure would outweigh the public interest in maintaining privilege. There were no factors, specific to the impact of disclosure on the Assembly, that bore any weight in the balancing

exercise and it was therefore just the general principle (that disclosure would discourage public authorities from taking legal advice or having an open discussion with its legal advisers) that had to be weighed in the balance. The Tribunal considered that the countervailing argument in favour of disclosure had been weakened as a result of the Assembly's voluntary disclosure that compulsion was not possible and that the option of changing the law on that point had been considered but rejected. In those circumstances the relatively weak argument against disclosure outweighed the even weaker argument in favour of it.

### Section 35

Although that was sufficient to determine the appeal the Tribunal went on to consider the s.35 exemption against the possibility that it might be decided, on appeal, that it had been wrong to characterise all of the information requested as covered by legal professional privilege.

It was accepted that the information did relate to the formulation or development of government policy and the Tribunal therefore proceeded to consider whether the factors in favour of maintaining that exemption outweighed the factors in favour of disclosure.

The Assembly argued that disclosure would result in harm in that:

- (a) staff would be less likely to explore speculative policy options;
- (b) policy analysis is frequently revisited after implementation had started and premature disclosure might close off discussion and hamper the development of different options; and
- (c) Assembly ministers must be able to "think in private".

The Tribunal concluded that these factors did not outweigh the public interest in having the information disclosed in order that the public could be better informed on whether the proposal in the manifesto could have been imposed. Accordingly, had s.35 been the sole determining factor, it would have ordered disclosure.

### **Conclusion**

The Tribunal concluded that the Assembly had been justified in refusing the disclosure of the information and the appeal was dismissed.