FOIA s.17 – Refusal of request

FOIA s.42 – Qualified exemption: legal professional privilege

Mr Anthony Berend v IC & The London Borough of Richmond upon Thames

EA/2006/0049 & 0050
12th July 2007

Cases:
Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48

Bellamy v IC & Secretary of State for Trade and Industry [2005] UKIT EA_2005_0023

Facts
There were two separate requests for information and thus two appeals that were heard simultaneously. The first request related to information pertaining to private meetings held regarding a task group's report into the background of the sale of a long lease sold on a piece of land (Squires Garden Centre and Fulwell Gulf Club). The appellant received an extension notice to the effect that the non-exempt information was being collated and the authority would need another 20 days to consider the public interest issues. The exemptions were never specified. Redacted copies of letters were received by the appellant a day late, but the public interest issues remained under consideration. The second request related to disclosure of material generated by the first request. Some of the information was disclosed but the rest was withheld on the basis of legal professional privilege. However, the documents were not sent with the notification. The authority later retracted their legal professional privilege claim.

With regard to the first request, the IC found:

- the authority breached s.10(1) FOIA by exceeding the statutory time limit for responding to a request made under s.1(1).
- There was no breach of s.17(2)(b) FOIA as the extension notice was served within the 20 day time limit. However, there was a breach of s.17(1)(b) as the notice did not specify the exemption in question.
- S.17(7) of the Act was breached as a response did not include details of complaint procedures.
- There was no breach of s.16(1) FOIA (and the s.45 Code of Practice) as inter alia:
    a) LBRT engaged sufficiently to establish what was wanted, assisted him in obtaining it, and maintained a dialogue.
    b) No further clarification was required to establish what information the complainant wanted.
    c) Entering into a debate about interpretation of FOIA was beyond the scope of s.16 FOIA.
    d) S.16 FOIA (and the s.45 Code of Practice) does not require a public authority to reply to communications by return.

- S.1 FOIA was breached as the s.40 FOIA exemption was incorrectly applied in relation to some of the information.
- LBRT were required to provide the redacted data that the IC had identified within the notice as not being exempt by virtue of s.40 FOIA within 30 days.

With regard to the second request, the IC found:

- LBRT had breached s.1(1) and 10(1) of FOIA in that the refusal notice did not contain the information requested which was not provided until much later.
- There was no breach of s.16 FOIA
- There was a breach of s.17(7)(b) FOIA as there were no details of the right to complain to the IC in the refusal notice.
- The s.42 FOIA (legal professional privilege) exemption applied to the material that was withheld and the public interest lay in withholding the information.

Findings

Section 16

The Tribunal stated that there is no general duty under the Act for an authority to initiate contact with the Appellant and so s.16 was therefore not breached. They also noted that having failed to meet deadlines of its own making the authority did not contact the Appellant to advance an explanation. However, the Appellant was quick to chase such deadlines upon their expiry and so the Tribunal felt that the matter was properly dealt with under ss.10 and 17.

With regard to the Appellant's allegations that the authority breached s.16 as they failed to provide the name of an identifiable officer according to the Code of Practice, the Tribunal held that there was no statutory requirement for an "information officer", and a named individual should be identified only "where possible". The Appellant had the direct contact details of the administrator, lawyer and person who was sourcing the information. As such the Tribunal was satisfied that the Appellant read too much into the Code and that the authority complied with their obligations under the Code in this respect.

The Appellant alleged that LBRT have breached s.16 FOIA by failing to assist him to reformulate his request to include a request for documents relevant to the Task Group investigations. He also alleged that LBRT breached s.16 FOIA in that they failed to tell him that there were no Minutes as such, but some notes and only limited Agendas of relevant Task Group meetings. The Tribunal considered this complaint had only tangential relevance to s.16 FOIA.

Section 17

The Tribunal agreed with the analysis of the facts as applied to the law by the IC and adopted by LBRT in that the purpose of s.17 is to alert the Appellant to the fact that an exemption is being considered (hence the absence of either the information or a refusal notice). It was accepted by the Tribunal that in failing to specify the exemption, the Appellant could not be expected to know which exemption was being relied upon. From the review it appeared that at that stage LBRT were themselves not clear which exemption they were relying upon. The Tribunal commented upon the way that LBRT handled the information request, but felt that there was substantial compliance in that:

- LBRT identified that no final decision had yet been made,
- The public interest test was being considered,
- A provisional estimate of a further 20 working days was provided.

This was sufficient to enable the Appellant to exercise his right to appeal to the IC (although it is acknowledged that in breach of s.17(7) the details of how to appeal were omitted from the notice).

The Tribunal disagreed with the IC's argument that the Appellant was aware that the exemption being considered was the s.40 FOIA (Personal Data) exemption from disclosure of the redacted information provided. From the disclosure of the redacted information it appeared that that public interest test had already been considered and decided upon in relation to that material. As noted from LBRT's review it appeared that at that time LBRT (not having looked at the information) did not yet know what exemptions they might wish to consider, and consequently which, if any, public interest test was applicable.

The Tribunal posed the question of what would have been the consequence of LBRT failing to issue any sort of notice under s.17 FOIA. The Tribunal observed that they would have remained in breach of ss. 1 and 10 FOIA. By the time the substantive response was received the purpose of s.17 had already passed. Consequently finding that the notice itself was null and void and that there had been a consequential breach of s.17(2)(b) would have no longer served any purpose. They held that the s.17 Notice did include a revised time estimate and an indication that no decision had yet been made. Finding that there had been a technical breach of s.17(2)(b) would have been misleading in light of the finding of facts relating to the contents. The Tribunal was satisfied that it is of assistance if in a Decision Notice it is clear to a public authority which aspects of the Act they have interpreted correctly and where they have committed a specific breach.

The Tribunal further noted that the Act provides that where the IC finds that a requirement of s.17 FOIA has not been complied with, the IC can direct the action required to remedy the specific breach. The Tribunal found accordingly that requiring the IC to find that the whole of s.17 FOIA must necessarily be found to be breached if one element is missing, is incompatible with this provision.

The Tribunal rejected the Appellant's argument that the notice was served out of time because it was sent at 18.04 which was outside working hours on the 20th working day as they were satisfied that the use of "working" in this context related to the definition found within s.10 of the Act. They commented that there is no definition within the Act as to the length of a day and in the absence of any such definition, they were satisfied that a day ends at midnight and that the email at 18.04 was sent during the 20th working day.

<u>Legal Professional Privilege</u>
The Tribunal was satisfied that there is no statutory definition of "Information Officer" and consequently nothing which precludes an Information Officer also acting as a legal advisor.

The Tribunal applied the analysis in the case of Three Rivers, and found that advisor's role was dependent upon his legal status. He was part of the legal department, whilst he may have been co-ordinating the response to an information request, his role was also to ensure that LBRT complied with their legal obligations under FOIA and that as such he was in a position to take instructions and give legal advice. Having viewed the emails the Tribunal was satisfied that the communications were between a professional legal adviser and his client and that they contained information passing between them as part of a continuum. Consequently the Tribunal was satisfied that s.42 was engaged.

The Tribunal considered the following arguments in favour of disclosure:

- That disclosure would promote accountability,
- That disclosure would assist in determining whether a public authority was acting appropriately in the execution of its public duties.

The Tribunal also considered the following arguments for maintaining the exemption:

- the emails related to a matter that was ongoing,
- release of the information would reduce confidence in the effectiveness of a final decision taken by officers,
- would hinder discussion by officers with legal advisers.

The Tribunal rejected the appellant's contention that the fact that the IC considered that there was a strong public interest in protecting the established principle of legal professional privilege meant that the exemption was being treated as absolute. They recognised that there will be circumstances where the public interest will lie in disclosure, however, in this case there was nothing beyond the general arguments of principle to counteract the strong public interest. The Tribunal was satisfied that the IC did not treat the legal professional privilege exemption as an absolute exemption and that he correctly undertook the balancing exercise required in consideration of the public interest test.

<u>The IC's investigative role into the sufficiency of the material disclosed</u>

The Tribunal dealt with the scope of the request, however, they also felt that notwithstanding the objective reading of the bulk of the request, the IC's office should have been alive to the restricted interpretation that was put upon elements of the request by LBRT. For example the IC never sought clarification of what exactly constituted "attached". Having not cross checked the disclosed information with that listed as attached, it was clear that the IC's office could not have considered the absence of documents alleged by the appellant to have been circulated or listed as "circulated" or "to follow" which were consequently attached by reference, and whether that fell within the request.

In light of the evidence before the IC the Tribunal felt that the IC's failure to investigate the matter went beyond the flaws that they conceded and that the IC was wrong to accept the bare assertion without investigation that all information covered by the request not subject to an exemption had been disclosed.

<u>If not all the information requested was exempt, whether it had been disclosed to the Appellant</u>

The Tribunal was satisfied that:

- the request should be read objectively by the public authority,
- there is no requirement to go behind what appears to be a clear request,
- the Tribunal is tasked to consider the request in the terms in which it was phrased and (in the absence of clarification under section 1(3) or amplification under section 16 FOIA and the section 45 Code) that subsequent amplification of the request should be treated as a fresh request.

The Tribunal had regard to the syntax of the request in terms of the meaning of the words ‘all’ and ‘working papers’, as the Appellant claimed that ‘all’ meant ‘all working papers’ and ‘working papers’ should be distinguished from ‘documents’ as they would include background papers attached to Agendas whereas working papers would not. Whereas LBRT argued that the “all” should properly be read as ensuring that all working papers attached to Agendas (rather than some of them) were provided and that the “all” should properly be said to apply to the “documents” as well and that the Appellant’s distinction between ‘working papers’ and ‘documents’ demonstrates his ‘belt and braces’ approach. The Tribunal considered whether there was any obvious grammatical or syntactical solution to the 2 apparent meanings. They concluded that whilst it would be possible to limit the request to a single objective interpretation, it can only be said with the benefit of hindsight when both readings have been clearly identified. The Tribunal was satisfied that in the specific circumstances of the facts of the case there were 2 ways that the request could be read objectively and upon one of the objective readings, the original request included a request for “all working papers”.

In keeping with the objective reading, the Tribunal stated that it was unnecessary to look at the Appellant’s motivation and intention in making the request after the suggestion that the Appellant was seeking to expand his request during the appeal process since it became clear that the documents he expected to exist did not exist. They commented that in a case where 2 objective readings **were apparent to a public authority** (which it is accepted was not the case here) they would be entitled to seek clarification of which one applied and then rely upon any clarification received in considering the request. In the absence of any such clarification the public authority is bound by the terms of the request as read objectively.

The Tribunal further rejected the suggestion that there was a form of clarification in the Appellant’s failure to further itemise his request during the extensive correspondence that ensued between LBRT and the Appellant for the following reasons:

- The Appellant did add “alternatively allow me to inspect the files together with my colleagues”. Which whilst phrased in the alternative and not superseding the original request expanded the ambit rather than reduced it.
- Until the Appellant had received the letter with the attachments, he was not in a position to know that his request was being read as “working papers attached to Agendas” rather than as a request for “working papers”.
- Shortly after he realized that he was not being provided with all working papers he articulated his expectation that his request had encompassed “all working papers” as his reference in his letter dated 10th August 2005 to the draft report and papers circulated to the Group members (both referred to outside the context of being attached to Agendas) makes plain.

The Tribunal did not criticize LBRT for the reading that they attributed to the Appellant's request, as if the request read objectively appears clear there is no duty to search out an alternative meaning. However, under s.1(1) the Appellant was entitled to be informed by LBRT whether they hold the information of the description specified in the request and if that is the case to have that information communicated to him (subject to the application of any exemptions). In light of their findings as to the ambit of the request, the Tribunal held that LBRT did not complete their obligations under s.1(1) FOIA in that no consideration was given to working papers which were not attached to Agendas.

The Tribunal were also satisfied that the contemporaneous notes were not themselves "Minutes". The Tribunal considered the question that much of the information that would be contained in "Minutes" was contained within the contemporaneous notes. They were satisfied that the information in "Minutes" would be the subject of summary, editorial control, explanation and might include points remembered by the author of the "Minutes" but not actually noted down. Consequently the Tribunal was satisfied that redacting or summarising the notes to provide the information that would have been contained in Minutes was going beyond the scope of FOIA, and would require the LBRT to prepare a fresh document and consequently the information which has been requested does not exist. They also held that because the contemporaneous notes took the form of annotations to documents that were being drafted and were used to remind one of action points and at times were referred to them in emails to other Task Group members, they were 'working papers' and should therefore have been considered for disclosure within the terms of the first request.

The Tribunal does not accept that for a document to be an Agenda, it must be entitled 'Agenda', or that there is a pre-requisite format for an Agenda wherein certain items must be scheduled for discussion to constitute an Agenda. However, the Tribunal was satisfied on the evidence that whilst there may have been the material upon which an Agenda would have been based, and treated as such by Task Group members, the emails or references to topics under discussion in contemporaneous notes were not in fact Agendas and as such did not fall to be disclosed under that heading.

The Tribunal held that at that time, documents emanating from the Appellant would prima facie be disclosable if they were considered by the Task Group as working papers or if they were attached to Agendas (as the Tribunal knew some were). LBRT had not yet claimed any exemption and would need to disclose that they held such documents and either provide them or indicate that they were not being provided in reliance upon an exemption in order to fulfil their obligations under s.1(1) FOIA.

<u>LBRT's handling of the information request</u>
In their dealing with the request the Tribunal generally found that the attitude of LBRT and its officers and employees was unhelpful and that they did not take their obligations under FOIA seriously.

In particular, the Tribunal received no satisfactory explanation of why on two separate occasions the information relating to the second request was not copied to the Appellant. The Tribunal was also concerned that the Appellant's request was subject to three internal reviews, which skirted around the real reasons for LBRT's delay and dealt selectively with the facts in dismissing the majority of the Appellant's complaints.

Conclusion

The Tribunal allowed the appeal in part and one of the Decision Notices was amended.

Observations

The Tribunal noted that notwithstanding its findings in relation to the breach or otherwise of s.17(2)(b) the use of s.17 FOIA by LBRT as an attempt to "buy more time" to undertake the primary consideration of the material and thus circumvent the obligation under s.1(1) to confirm or deny what information was held within 20 working days was an inappropriate use of the provisions of the Act, and was surprised that the IC did not remark upon this in his Decision Notice.