FOIA s.1 – Right of access

FOIA s.10(1) – Time for Compliance

FOIA s.17(1) – Refusal of Request

FOIA s.42 – Qualified exemption: legal professional privlege

Mr F Adlam v IC & HM Treasury

EA/2007/0079
5th November 2007

Cases:
Bowbrick v IC and Nottingham City Council [2006] UKIT EA_2005_0006

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

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

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

Facts

The Appellant sought information which underlay an announcement by Mr Gordon Brown as Chancellor of the Exchequer in his first budget statement of 2 July 1997 regarding his intent to recoup the full costs of treating road accident victims from insurers. The request was made on 24 March 2005. The Treasurer responded on 2 June 2005 stating simply that it did not hold any information regarding the request. The Appellant sought further details, but on 13 September 2005, the Treasury again maintained that despite a full search it had not found any information or records. It followed that the original request was not dealt with within the requisite 20 day period provided by the Act.

The Appellant made a parallel request to the Department of Health which had been refused on costs' grounds but in the process the Department of Health stated that it did not hold the information. Meanwhile, an internal review within the Treasury confirmed the Treasury's earlier decision.

After the Appellant had complained to the IC, the Treasury again confirmed to the IC that it did not and had not held the information requested.

In a Decision Note dated 19 September 2006, the IC pointed out that the Treasury had indicated that given the fact that the budget speech was the first following the election of the Labour Government in May 1997, the policy to which the request related could have been formed while that Government was in opposition and such a possibility was advanced by the Treasury as a possible reason as to why it did not hold information relevant to the Appellant's request. The IC also stated that he was satisfied the Treasury had taken appropriate steps to locate the requested information.

Although the 20 day limit prescribed by s.10(1) of the Act had been infringed, no steps needed to be taken.

The basis of the appeal dated 16 October 2006 was that it was "implausible" that the Treasury would not hold the information. The IC replied to the effect that he understood searches had been made of electronic and paper records, and although the IC was not aware that individuals such as the former Chancellor had been approached, it was unlikely that over some eight years anyone would retain any personal relevant knowledge.

In late February 2007, two relevant documents came to light for the first time during the course of preparation for the appeal. The first was a letter from the NHS Executive dated 4 June 1997 to the Treasury. The Treasury claimed that section 42 of the Act relating to legal professional privilege was engaged. The second document being a letter dated 29 April 1997 sent by the NHS Executive to the Treasury was produced, but redacted to remove the names of the sender and recipient and a portion of its content. As to the second document, the Treasury maintained it fell outside the strict terms of the request since it was written before the Chancellor's appointment. The Treasury therefore formally conceded that it had previously misrepresented the position to the IC regarding the non-existence of the documents. In the wake of this belated disclosure, the IC contended:

(1) there had been a breach of such intent;
(2) there had been a belated reliance on section 42, but the principles in the *Bowbrick v IC and Nottingham City Council* applied; and
(3) section 42 was properly engaged with regard to the 4 June 1997 letter and the public interest in maintaining the exemption outweigh the public interest in disclosure.

The Treasury in addition voluntarily disclosed a number of other documents which in his view also fell outside the terms of the request principally because they fell in a time frame which stopped short of the budget announcement.

Findings

The Tribunal noted that the redaction in the letter dated 29 April 1997 was appropriate in the interests of consistency and prudence.

The Tribunal agreed with the IC that the breaches of ss.10 and 17 were not deliberate.

The Tribunal concluded that s.1 contained an absolute obligation although section 1 did also give the public authority the option to postpone its need to comply with that obligation if it needed further information.

The overall aim of the Act was to ensure that good practice as a whole was maintained by the public authorities. The Tribunal rejected the Treasurer's contention that an honestly held though misguided answer could not be regarded as a form of "misinformation" reflecting the phrase "to be informed" set out in section 1. Nor did the Tribunal view the making of a declaration of such a breach or breaches as in any

way unfair. The breaches here consisted of breaches of s.1, 10 and 17 and were non-culpable: no steps needed to be taken.

As for the letter of 4 June 1997, the Tribunal confirmed the IC's contention (which post-dated the Decision Notice) that section 42 was engaged applying the *Bowbrick* decision. The exchange in question was between parties, i.e. two different Government departments which had a common interest, and in the circumstances did not lose its privileged quality. The Tribunal applied *Bellamy* clarifying the sense of paragraph 35 in that decision: it also found *Kitchener* (EA/2006/0044) more consistent with *Bellamy* than *Shipton* (EA/2006/0028).

The facts put forward in favour of a public interest favouring disclosure affected overall the private interests of the Appellant. These were principally the effect on the Appellant who had conducted a business which had benefited from the regime instituted prior to the implementation of the Chancellor's announcement, and secondly, reliance was placed upon events which occurred in the wake of the announcement.

As for the Appellant's reliance on the age of the information sought, the Tribunal rejected the suggestion that the older the information, the weaker the public interest in maintaining the exemption: see section 62 and 63 which render records "historical" over thirty years.

The Tribunal viewed the Ministerial convention - which allowed more policy created under a previous administration to be revisited in a subsequent administration providing no embarrassment occurred to the previous Minister - as addressing predominantly the transmission of personal views of outgoing Ministers. The Tribunal endorsed the IC's finding that the view of the request taken by the Treasury was justified, even though the Treasurer's principal witness accepted as indicated above that were a similar request received today, elaboration would be sought.

As for the question of whether a reasonable search was conducted, the Tribunal again endorsed the IC's view that one should take the public authority as one finds it. Much turned upon the request as in this case and the Tribunal again found that the interpretation afforded by the Treasury to the scope and meaning of the request as formulated by the Appellant acting by solicitors was justified. Moreover the search methodology employed by the Treasury was reasonable.

Conclusion

The Tribunal amended the Decision Notice to find:

(1) there were breaches of ss.1, 10(1) and 17(1);
(2) such breaches were purely technical and not culpable;
(3) s.42 was engaged with regard to the 4 June 1997 letter and public interest favoured non-disclosure; and
(4) no steps needed to be taken by the public authority.