

FOIA: Public interest test s.2; Formulation or development of government policy s.35(1)(a); Ministerial communications s.35(1)(b); Legal professional privilege s.42.

Dermod O'Brien v IC & BERR

EA/2008/0011

7th October 2008

Cases cited:

ECGD v Friends of the Earth [2008] EWHC 638 (Admin)

OGC v IC [2008] EWHC 774 (Admin)

Hogan & Oxford City Council v IC EA/2005/0026

Bellamy v IC EA/2005/0023

Mersey Tunnel v IC EA/2007/0052

Pugh v IC EA/2007/0055

Fuller v IC EA/2008/0005

Facts

Mr O'Brien requested all documents relating to the exclusion of fee-paid judiciary from the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 which implemented EU Council Directive 97/81/EC which provides for part-time workers being treated no less favourably than comparable full-time workers. BERR's predecessor, the DTI, refused to disclose the information claiming the ss.35 and 42 qualified exemptions. Mr O'Brien complained to the IC who largely upheld BERR's decision to refuse disclosure.

Findings

The Tribunal found that both exemptions were engaged but that the public interest balance favoured disclosure of most of the information. The Tribunal took into account a number of factors in favour of maintaining the exemptions including the need for the DTI to have a private space for policy deliberations but that over time the strength of this exemption diminished and this was the case here where the request was made 5 years after the 2000 Regulations came into force. However it considered that the fact the exclusion was introduced without prior consultation gave rise to legitimate public concern because it appeared to single out one particular group for special treatment which would add to the possible sense of unfairness on the part of that group that they did not have an opportunity to say anything about it before it became law.

Conclusion

The Tribunal largely allowed the appeal but required that the identities of civil servants remain confidential. It considered that there may be other information the subject of the request which BERR had not yet found and required the Department to use its best endeavours to find and retrieve such information.

Observations

The Tribunal found that legal professional privilege covers advice given by "in-house" lawyers and assumed that if legal advice is repeated by officials in one department to those in another it still remains privileged.