

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

**FOIA s.43** – Qualified Exemption: commercial interests

## ***Christopher Bellamy v IC & The Secretary of State for Trade and Industry***

**EA/2005/0023**

### **Cases:**

*R v Derby Magistrates ex p P* [1996] 1 AC 487

*Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16

*R (Morgan Grenfell & Co Ltd) v Special Commissioners of Tax* [2003] 1 AC 563

### **Facts**

The Appellant had been in correspondence with the DTI regarding the status of certain franchise schemes under fair trading legislation. The DTI stated that the position it adopted on the issue was based on the opinion of Treasury Counsel. The Appellant made a request under the Act for disclosure of materials presented to counsel and the advice received. The request was rejected on the basis that legal professional privilege applied to the information requested and that it was therefore exempt information under s.42 FOIA. It also relied on the s.43 exemption in that the information was likely to prejudice commercial interests.

The IC held with regard to s.42 that it was less likely in his view that disclosure of information affecting such a small group would “...serve the public interest than maintaining the exemption in order to allow legal advice to be provided unfettered by concerns about disclosure.” With regard to s.43, the Commissioner merely noted and accepted that “rightly or wrongly, the mere suggestion that such a company [i.e. the Chem- Dry companies or group of companies] had been under investigation could have an adverse effect on its commercial interests and that of its 12 franchisees.” In those circumstances with regard to both qualified exemptions, the Commissioner upheld the prior decisions of the DTI.

### **Findings**

It was accepted that the material in question was covered by legal professional privilege and that the s.42 exemption therefore applied.

The Tribunal stated that legal professional privilege is a fundamental right in relation to the administration of justice – see *R v Derby Magistrates ex p P* [1996] 1 AC 487, in *Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16 and *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Tax* [2003] 1 AC 563. It was important that public authorities be able to conduct a free exchange of views with those giving them legal advice without fear of intrusion.

They further stated that there is a strong element of public interest built into legal professional privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest. The Tribunal noted that it may be that in certain circumstances where the legal advice had become stale the public interest in favour of disclosure might be given particular weight. However, in the present case the matter on which legal advice had been obtained was still live and the Appellant had not demonstrated that it was a case where the public interest in maintaining the exemption was outweighed by the public interest in disclosure.

The Tribunal stated that in applying the public interest test under s.2(2) they must weigh the public interest in maintaining the exemption, which is manifested by the particular provision creating the exemption, against the public interest in disclosing the information. It followed that not all public interest considerations – which might otherwise appear to be relevant to the subject matter of the disclosure – should be taken into account. They held that what has to be concentrated on is the particular interest necessarily inherent in the relevant exemption.

### **Conclusion**

The Tribunal dismissed the appeal.

### **Observations**

In reaching its decision the Tribunal placed no great weight against the public interest in disclosure, on the fact that the constituency of which the Appellant formed a part was small. It was quite possible that in any given case there would be sufficient public interest in disclosure even though the number of individuals affected was relatively low.

The Tribunal noted that the decision by the Information Commissioner on whether a qualified exemption applies and, if so, how the public interest balance should be applied is not an exercise of discretion but a question of mixed law and fact. If the Tribunal comes to a different view from the Information Commissioner on the public interest balance under section 2(2)(b) it may overrule him.