

**Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber)
Rules 2009:**

Application for disclosure of closed material to counsel for requestor to enable him to take part in closed session: effect of rules 2 and 5 - whether rule 14 applicable.

DEFRA v INFORMATION COMMISSIONER and SIMON BIRKETT

Case Number: EA/2009/0106

13 May 2010

Cases:

Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence EA 2006/0040

Facts

Mr Birkett requested DEFRA under EIR to supply minutes, correspondence and other material relating to a meeting held between Lord Hunt and the Mayor of London on 22 January 2009 concerning air quality in London. By the time of the appeal hearing a limited amount of information remained undisclosed and the Commissioner agreed with DEFRA that it could be withheld under EIR. In those circumstances counsel for Mr Birkett, who had been joined as a third party, applied to the tribunal for a direction that the closed material be disclosed to him so that he could participate fully in the appeal on terms that he would not disclose the information to anyone else including his client.

Findings

Counsel for Mr Birkett submitted:

- a. that the use of “confidentiality rings” is well-established in other courts and tribunals (in particular the Competition Appeal Tribunal);
- b. that it is reflected in the commentary to the Civil Procedure Rules in the White Book;
- c. that there is provision for it within the Tribunal’s own rules;
- d. that disclosure to him would allow him to make well-focussed and relevant submissions about the undisclosed information which

would not be made by DEFRA or the Commissioner.

The Tribunal refused to make the order sought stating:

(1) under rules 2 and 5 the Tribunal had power to make an order like the one sought (and indeed an order for the appointment of “special counsel” had been made in Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence EA 2006/0040);

(2) rule 14 was not relevant to the making of such an order: it was concerned with other types of appeal covered by the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009;

(3) the use of confidentiality in other jurisdictions was not relevant because in those jurisdictions the substantive issue to be determined was not whether the material itself had to be disclosed as it was under the FOIA or EIR;

(4) the Tribunal is frequently in the position of fulfilling an inquisitorial role in relation to withheld material which the Commissioner is not arguing should be disclosed and is experienced in fulfilling that role;

(5) only in an exceptional or unusual case would it be appropriate to appoint a special advocate or order disclosure to counsel for the requestor on terms;

(6) this was not such a case: the disputed material was not voluminous and the Tribunal had already read it and was satisfied that it could adequately perform its inquisitorial role if necessary with specific assistance from the Commissioner or even counsel for the requestor who could make submissions in response without seeing the material.