

FOIA s.1(1) – Duty to confirm or deny

FOIA s.2(2) – Public interest test

FOIA s.42 – Qualified exemption: legal professional privilege

Mr Trevor Kitchener v IC & Derby City Council

EA/2006/0004

20th December 2006

Cases:

Kirkaldie v IC and Thanet District Council [2006] UKIT EA_2006_001

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

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

Lamb v IC [2006] UKIT EA_2006_0046

Facts

The Appellant wrote to Derby City Council to request information relating to records, transactions and memoranda in regard to dealings between Derby Social Services Department and members of his family. Some of the information was withheld on the basis that it constituted exempt information under s.42 FOIA.

The IC was satisfied that the information being withheld was subject to legal professional privilege and therefore exempt from disclosure unless the public interest in disclosing it outweighed the public interest in maintaining the exemption. The IC held that the public interest in maintaining the exemption clearly outweighed the public interest in disclosure.

Findings

Legal Professional privilege

On reviewing the document in question, the Tribunal confirmed that it was written by a Barrister and contained advice from him in connection with Crown Court (Family Division) proceedings which related to the Appellant's granddaughter. They stated that it is a long-standing principle of English law that no one can be compelled to disclose advice received from a lawyer in connection with court proceedings. Therefore the document fell within this category and the s.42 exemption was engaged.

In carrying out the balancing exercise required by s.2(2) the Tribunal acknowledged that if the factors for and against disclosure were equally balanced then the information would be disclosed because the public interest in maintaining the exemption would not have outweighed the public interest in disclosure. It took account of the Appellant's understandable desire to have information that would help him to understand why care proceedings had been taken in relation to certain members of his family and considered that the information might also help the public to assess the Council's performance in relation to care proceedings and the policy that

it had adopted based on the legal advice it had received. Against those factors the Tribunal balanced the fact that an inherent part of a fair trial is the facility for a party to communicate frankly with its lawyer in providing information or receiving advice without the possibility of their exchanges subsequently being made public – *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563.

Although the public interest in favour of maintaining the legal professional privilege exemption was therefore a powerful one, acknowledged to be part of the right to privacy guaranteed by Article 8 of the European Convention on Human Rights, s.42 was still a qualified exemption. It followed that there would therefore be cases when the public interest in disclosure would not be outweighed by the public interest in maintaining privilege. One example of such a case was the IC's decision in the case of *Lamb* that the recorded information that led to or supported the Attorney General's advice on the legality of the Iraq war should be disclosed (although it was only the final advice, and not those parts of the recorded information on the subject which were of provisional, preliminary or tentative nature, or which might have revealed legal risks, reservations or possible counter arguments, that were disclosed in that case). However, each request for information must be considered on its merits and a decision on one case would not be binding in relation to a later one. The case of the Attorney General's advice was acknowledged at the time to have been highly exceptional. It was very far removed from the Appellant's request and did not assist the Tribunal.

The Tribunal noted that Parliament has said, in s.2(2)(b), that the Tribunal should consider the balance for and against disclosure "in all the circumstances of the case." Amongst the circumstances particularly considered was the fact that the Barrister's advice was relatively recent. Secondly, was the fact that the Council maintained that the advice was regularly reviewed for the purposes of child protection and that the information was used for the purpose of creating a corporate policy, to which end, that policy was still enforced; therefore the advice was still current.

The Tribunal held that the public interest in maintaining the exemption outweighed the public interest in disclosure, therefore the Commissioner was correct in his finding.

Conclusion

The Tribunal upheld the decision notice and dismissed the appeal.