

| **FOIA s.3** – Public authorities

FOIA s.40 – Absolute exemption: personal data

FOIA s.41 – Absolute exemption: confidential information

Ennis McBride v IC & Ministry of Justice (previously the Privy Council Office)

EA/2007/0105

27th May 2008

Cases: R v. Lord President of the Privy Council (on appeal from R v. Hull University Visitor) [1993] AC 682

Facts

The Appellant made a number of requests to the PCO for information including for a copy of the contents of his Visitor (University of London) file (“Request 1”); and details of all interests declared by Baroness Amos under the Ministerial Code of Conduct or otherwise (“Request 2”). The PCO provided some of the information requested. In respect of the rest, it relied on various exemptions under FOIA, or said that no information had been found.

The IC held that the PCO had dealt with Request 1 in accordance with s.1(1) of FOIA. The information was not held by the PCO for the purposes of FOIA. However, in failing to advise the Appellant that it did not hold the information, it had breached its obligation under s.1(1) of FOIA. As regards Request 2, the IC held that the PCO had correctly applied the exemption in s.41.

Findings

Request 1

The Tribunal was obliged to consider whether the information in the possession of the PCO was held by the PCO for the purposes of FOIA. The PCO accepted that it had the information. However, it said that it held it on behalf of another (the University Visitor), and therefore, under section 3(2), it was not subject to FOIA obligations in respect of this information.

The Tribunal commented that by virtue of section 3(2), information that is held by a public authority on behalf of another person is not “held” by the public authority for the purposes of FOIA. FOIA does not define what is meant by “held”. It does not use terms such as “power, possession or control”, nor does it adopt the language in The Environmental Information Regulations 2004 which provide that “held” means information that “is in the authority’s possession and has been produced or received by the authority.”

The Tribunal reiterated that whether the PCO held the information on behalf of another was a question of fact. It did not turn on the status of the Privy Council Office or the Visitor. It also did not turn on who owned the information, or on whether the PCO had exclusive rights to it, nor on whether there was any statutory basis for the PCO to hold the information.

On the evidence, the Tribunal found that the PCO held the information on its own behalf. As a matter of practice and perception, the PCO's role in relation to Visitor cases was integral to its functions. This was not a situation where the information was simply on the PCO's premises because, for example, the Visitor had left it there. The PCO managed and controlled the information, and the PCO itself produced much of the information contained in Visitor files. The PCO could edit or delete the information, and it could decide whom to send it to or whom to withhold it from. In response to the Appellant's requests, it could have provided him with the information, and in fact it did provide some. It was not suggested that it did not have the authority to do so.

The Tribunal commented that the fact that an applicant may be entitled to information in relation to this Visitor, but not in relation to others where the equivalent information is not held by a public authority, does not detract from their reasoning. FOIA is not a guarantee that different public authorities will hold the same type of information; it simply provides a regime where applicants can access the information that a public authority does hold.

Request 2

Some of the arguments put forward by the IC and the PCO as to why section 41 was engaged related to why it was in the public interest that this information should not be disclosed. However, the Tribunal pointed out that s.41 is an absolute exemption. In order for the information to be exempt, s.41(1)(b) requires that disclosure should constitute an actionable breach of confidence. Public interest may be a relevant consideration in assessing whether there is likely to be a defence to such an action, but the public interest relevant there is the public interest in disclosure, rather than the public interest in withholding the information.

Given the nature of the information in issue, and the circumstances in which it was imparted to the PCO, the Tribunal were satisfied that disclosure would constitute a breach of confidence actionable by Baroness Amos. The information was clearly imparted in circumstances which gave rise to an expectation of confidentiality, if not an express agreement that it would be kept confidential. The Tribunal also commented that if it was also necessary to show detriment arising from its disclosure, they found that the nature of the information which relates to Baroness Amos' private financial interests, would compromise her private life.

Finally, they commented that in claims for breach of confidence, the law recognises, in some cases, a defence of public interest. However, the private interests of Baroness Amos in the withheld information outweighed any public interest in disclosure, and the qualified right to freedom of expression under Art 10 of the ECHR. The Ministerial and House of Lords' Codes of Conduct set out a framework for disclosure of interests that might give rise to a potential conflict or a perception of such conflict. Those interests that were considered to be "relevant interests" were publicly declared

by Baroness Amos. There was no suggestion that the test of “relevant interests” was not correctly applied, and no reason to find, on the facts of this case, that the test of public interest as reflected in the Code of Conduct fell short of what a Court would apply in an action for breach of confidence.

Conclusion

The appeal was therefore allowed as to Request 1, but was rejected in relation to Request 2.