



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
[INFORMATION RIGHTS]**

**Case No. EA/2011/0145**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50348631  
Dated: 16 June 2011**

**Appellant:** Doreen Crawford  
**Respondent:** The Information Commissioner  
**Additional Party:** Lincolnshire County Council

**On the papers**

**Date of decision:** 05 December 2011

**Before  
Chris Ryan  
(Judge)  
and  
Melanie Howard  
Pieter de Waal**

**Subject matter:** Legal professional privilege s.42  
Public interest test s.2

**Cases:** *Department for Business Enterprise and Regulatory Reform v O'Brien & Information Commissioner* [2009] EWHC 164 (QB)

**DECISION OF THE FIRST-TIER TRIBUNAL**

The appeal is dismissed.

**REASONS FOR DECISION**

Summary

1. We have decided that the information in dispute in this Appeal fell within the legal professional privilege exemption provided for under section 42 of the Freedom of Information Act 2000 ("FOIA") and that the public interest in maintaining that exemption outweighed the public interest in disclosure.

Background

2. The appeal is from a Decision Notice issued by the Information Commissioner on 16 June 2011. The Information Commissioner decided that Lincolnshire County Council ("the Council"), while at fault on some issues that do not form part of this Appeal, had been entitled to refuse a request from the Appellant, Mrs Crawford, for copies of the legal advice it had obtained both before it took a particular decision and between the time when it made that decision and subsequently announced it to the public.
3. The decision in question was to phase out a scheme, in operation since 1987, under which the Council paid the fees of a number of children to enable them to attend Stamford Endowed Schools. The scheme appears to have been instigated in order to provide suitable education for academically able students who would otherwise have to travel a considerable distance to obtain appropriate schooling. We can understand the significance, to students, parents and others, of a decision to bring such a scheme to an end. However, the Council refused Mrs Crawford's request. It did so on the basis that the information requested was information in respect of which a claim to legal professional privilege could be maintained and that it therefore fell within the scope of the exemption to the Council's obligation to disclose information provided for by section 42 of the Freedom of Information Act 2000 ("FOIA").
4. The relevant part of section 42 reads:  
*"(1) Information in respect of which a claim to legal professional privilege...could be maintained in legal proceedings is exempt information."*

The effect of FOIA section 2(3) is that section 42 is categorised as a qualified exemption. That means that information falling within it must still be disclosed if *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"* (FOIA section 2(2)(b)). In refusing the request the Council maintained that there was an inherent public interest in safeguarding the openness in communications between a client and its legal advisor to ensure access to full and frank legal advice. It asserted that, although the immediate purpose for which the advice had been obtained lay in the past, the advice itself remained relevant and would continue to do so into the future. The Council maintained that position during the course of the Information Commissioner's investigation into Mrs Crawford's complaint about its handling of her request, as well as in a written submission filed with the Tribunal.

5. The Decision Notice sets out the background to Mrs Crawford's complaint and summarises the Information Commissioner's investigation of it.

### The Appeal

6. The Appeal from the Information Commissioner's Decision Notice was determined, by agreement between the parties, without a hearing and on the basis of an agreed bundle of documents and written submissions presented by each of the parties. In addition we were provided, in a closed bundle, with copies of the documents containing the withheld information. Mrs Crawford therefore suffered the, unfortunately inevitable, disadvantage of having to prepare her submissions without seeing the information in dispute.
7. In his Decision Notice the Information Commissioner decided, first, that the withheld information was covered by legal professional privilege and that the section 42 exemption was therefore engaged. He then decided that the public interest in maintaining that exemption outweighed the public interest in disclosure. He conceded that some weight had to be attached to the general principles of achieving accountability and transparency to increase public understanding of decisions taken by public authorities. He also accepted that the particular decision under consideration in this case involved an issue of considerable importance to the public in the local area, both because it affected the Council's duty to provide suitable schooling and because it related to the use of public funds. However, he ultimately decided that those interests were outweighed by the public interest in maintaining the confidentiality of information covered by legal professional privilege. Disclosure, he said, would undermine the right of a public authority to seek and obtain realistic and frank legal advice. It would also introduce unfairness in any legal challenge because one of the two litigating parties would have access to its opponent's legal advice. And, on the

particular facts of this case, the public interest in maintaining confidentiality had not been significantly diluted by the passage of time up to the date of refusal due to the continuation of its contract with Stamford Endowed Schools during the tapering down period of the original scheme

8. We deal with each of the issues the Information Commissioner decided in order.

Information covered by legal professional privilege?

9. Mrs Crawford's request was for "legal advice obtained by the Councillors". The Council indicated in its reply that there might be a distinction between advice tendered to Councillors and that provided to the Children's Services Department of the Council. This led to an ultimately sterile debate, continued in the written submissions, to the effect that the "Councillors" may be a separate legal personality from the department referred to, and that privilege could only be claimed by the former. However, the Council comprises its officers and elected members and the original request for information should be interpreted as having been addressed to that body. No distinction therefore arises, which has any relevance to the issues at stake in this decision.
10. We have carefully reviewed each of the documents in the closed bundle. We are satisfied that legal professional privilege has been properly claimed in respect of each one. We reach that conclusion on the basis of both the status of the individuals who wrote or received the documents in question and the content of those documents. Each one provided or recorded legal advice and, to the extent that any one of them extended into practical advice, it still did so in the context of a relevant legal issue.

Public interest in maintaining exemption outweigh public interest in disclosure?

11. In *Department for Business Enterprise and Regulatory Reform v O'Brien & Information Commissioner* [2009] EWHC 164 (QB) Wyn Williams J expressly approved the approach which he said had been consistently adopted by this Tribunal, as summarised in a passage from the Tribunal decision in Calland (EA/2007/0136) which the Judge quoted. The quoted passage read:

*"What is quite plain, from the series of decisions beginning with Bellamy ... is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyers and client, which the client supposes to be confidential".*

Wyn Williams J then went on to record that the Tribunal's approach was:

*“... based squarely upon decisions of courts of the highest authority upon the importance to be attached to the concept of legal professional privilege. It suffices that I simply identify two such decisions; R v Derby Magistrates Court ex parte B [1996] 1 AC 487 and R(Morgan Grenfell and Co Ltd) v Special Commissioner for Income Tax [2003] 1AC 563.*

12. Our starting point, therefore, is that the exemption is qualified, not absolute, but that Mrs Crawford must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute. Mrs Crawford put forward a number of issues which she argued should be weighed in the balance. With respect to her, we feel that at some points in the various submissions she placed before us, she allowed the fact that the Council's educational obligations are imposed by law to become confused with the question as to whether or not the legal advice it received was correct. All of the Council's activities are regulated by law, in one form or another, and the fact that this is so ought not to undermine its right to the usual protection to legal professional privilege enjoyed by all individuals and organisations.

13. We set out below a number of the arguments Mrs Crawford put before us, in addition to those already mentioned, and add our conclusions in respect of each one:

- a. An unusual degree of transparency was required in this case because of a general lack of understanding of the difficult issues affecting the fee-paying scheme, a lack of understanding that was exacerbated by the non-disclosure of the legal advice.

Disclosure of legal advice would have increased the amount of information made available to the public but in our view the resulting increase in public understanding of the decision-making process would have been marginal given that a considerable body of information had been made available by the Council, including minutes of meetings and discussion documents tabled at them. We therefore attach only limited weight to this factor in favour of disclosure.

- b. It was not for the Information Commissioner to decide the level of public understanding; it was for the public to decide whether disclosure would add to its understanding.

We believe that this argument confuses matters which may interest the public with matters which, objectively assessed, are in the public interest. Applying that test the Information Commissioner identified aspects of public interest in support of disclosure (see paragraph 7 above) but did not believe that they equalled or outweighed the public interest in maintaining the exemption. We agree with that conclusion.

- c. The advice might be bad (in fact Mrs Crawford expressed her view that it was indeed wrong) and the only way its correctness

could be challenged was if it could first be opened up to public scrutiny.

However, it is not the Council's advice that may properly be challenged, but its decisions. The challenge may be political or, in certain circumstances, through the legal process of Judicial Review. In neither circumstance is the legal advice underpinning the decision likely to be of significance. That is self evidently the case in relation to a political challenge. And, as for judicial review, a public authority's decision may fly in the face of the legal advice it received, but survive challenge if the Judge forms a different view of the law. Conversely it may be set aside on review, despite having been very carefully based on legal advice. Ultimately a court's decision is just the opinion of another lawyer. Its decision will be determined solely by the view of the law that the judge forms, not the fact that another lawyer formed the same view (or a different one). We also accept the Council's argument that it would be unfair, in any Judicial Review proceedings, for those challenging the legality of a decision to have been pre-armed with the Council's legal advice. We conclude, therefore, that this argument provides greater support for the Council's position than that of Mrs Crawford.

- d. Since the advice was given, and the decision made, to taper the scheme a further review has indicated, in Mrs Crawford's view, that the Council had been over-optimistic about the chance of a local comprehensive school improving to the stage where it could in effect replace Stamford Endowed Schools as an appropriate local source of education for the most able students. In our view, whether or not that is true is irrelevant to the question of disclosing legal advice; the argument addresses the Council's assessment of educational and practical issues (which this Tribunal has no jurisdiction to consider) and not the quality of the legal advice that may have influenced the assessment.

14. In the circumstances Mrs Crawford has not persuaded us that the factors she relies on give rise to a public interest that equals or outweighs the public interest in maintaining the section 42 exemption. We therefore agree with the Information Commissioner's conclusion that, in this respect, the Council had complied with its obligations under the FOIA when it refused Mrs Crawford's information request.

15. Our decision is unanimous.

Chris Ryan  
Tribunal Judge  
05 December 2011