IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0206**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No:
Dated: 25 August 2011

Appellant: Mr Alan Fisher

Respondent: Information Commissioner

Additional Party: Department for Work and Pensions

Date of hearing: 6 February 2012

Before
Melanie Carter
(Judge)

and

Dr Malcolm Clarke
Alison Lowton

Subject:
FOIA Legal professional privilege s.42

Cases:

DBERR v O'Brien & Information Commissioner [2009] EWHC 164 (QB); [2011] 1 Info LR 1087
Fuller v Information Commissioner & Ministry of Justice EA/2008/0005
Calland v Information Commissioner & FSA EA/2007/0136

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the decision of the Information Commissioner and dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal arises from a letter of request from Mr Fisher, the Appellant, under the Freedom of Information Act 2000 ("FOIA") to the Department for Work and Pensions ("DWP") dated 8 September 2010. The request concerned the Health & Safety at Work (Offences) Bill (now an Act) and in particular the proposed legislative change to impose a term of imprisonment for certain offences. The particular health and safety offences were already subject to a reverse burden of proof insofar as a defendant wished to rely upon a statutory defence. The focus of the request therefore was whether the introduction of imprisonment for these offences would entail a breach of article 6, the right to a fair trial, under the European Convention of Human Rights. Previous court cases had accepted a reverse burden of proof as acceptable in the criminal context in relation to certain offences, but this had been at a point in time when the offences only attracted non-custodial sentences.

2. To put this particular request for information by Mr Fisher in context, this had followed an earlier letter of request, which became the subject of an earlier Tribunal hearing (EA/2010/0044). That request, which is referred to here as the "first request" (and the subsequent Tribunal hearing, referred to as the "first Tribunal"), was dated 20 April 2008 and was for:

> "*Any document or legal opinion which contains the opinion of the dept of the DWP referred to in para 21 of the explanatory notes"*.

3. The reference to paragraph 21 was to a statement in the Explanatory Notes to the then Bill stating that in the DWP's view, the proposed change was compliant with human rights. Paragraph 21 stated:

> *"The Department for Work and Pensions is of the opinion that, in making imprisonment available as a potential penalty for an offence to which the reverse burden applies, the Bill is compatible with Article 6 of the ECHR, in that it strikes a fair balance between the fundamental right of the individual and the general interests of the community..."*

4. The first Tribunal held that that the ICO had been correct in upholding the DWP's refusal to disclose information that was subject to section 42 FOIA (exemption for legal professional privilege).

5. There was a second request dated 2 July 2010 from Mr Fisher to the DWP in which he asked for *"a detailed written statement of the reasons why the DWP Ministers considered that the Health and Safety (Offences) Act (when it was introduced as a Bill) was compliant with the ECHR"*. As a result of this request, the DWP produced a document setting out further detail as to the Minister's reasons for giving the statement of compatibility ("the Detailed Statement").

6. Mr Fisher made a third request, dated 8 September 2010, which is the subject of this appeal and, insofar as within scope of this appeal, is set out below:

   (i) *'the information referred to in the Decision of the Tribunal (EA/2010/0044) [the first Tribunal] at paragraph 2 as … 'the settled legal advice giving rise to the Ministers opinion'';*
   (ii) *'the other opinions, information or documents referred to at paragraph 16 of the Tribunal's Decision'.*

7. On 3 November, DWP notified Mr Fisher that the particular information requested under (i) and (ii) above, was being withheld under section 42(1) FOIA as it was covered by legal professional privilege and the DWP considered that the public interest in non-disclosure outweighed that in its disclosure.

8. The refusal was upheld on internal review and following a complaint to the ICO and his investigation, he issued a Decision Notice, upholding the DWP's decision. In this appeal, we consider whether the Decision Notice is in accordance with law.

9. By the hearing of this appeal, it had been accepted that the section 42 exemption was engaged on the basis of legal advice privilege (as opposed to litigation privilege). Thus, the grounds of appeal had crystallised as being essentially that the ICO had been incorrect in upholding the DWP's balancing of the public interest test and that he ought to have concluded that the balance came down in favour of disclosure.

Evidence

10. Before the Tribunal was a bundle of papers including witness statements from Mr Fisher and Mr Wolfe, a senior policy officer whose title is Deputy Director in the DWP's Health and Wellbeing Directorate. Mr Wolfe gave oral evidence at the hearing.

11. The Tribunal was provided with a copy of the disputed information, which included the legal advice which had been before the first Tribunal. The disputed information was not however disclosed to Mr Fisher during the proceedings as to have done so would have been to defeat the purpose of the appeal.

The Law

12. This Tribunal's jurisdiction in relation to appeals is pursuant to section 58 of FOIA. For the purposes of this appeal, the Tribunal must consider whether the Decision Notice is in accordance with law. The starting point is the Decision Notice itself but the Tribunal is free to review findings of fact made by the IC and to receive and hear evidence which is not limited to that before the IC. In cases involving the so-called public interest test in section 2(2)(b), as here, a mixed question of law and fact is involved. If the Tribunal comes to a different conclusion under section 2(2)(b) on the same or differently decided facts, that will lead to a finding that the Decision Notice was not in accordance with the law.

13. Section 42, which is contained in Part II of FOIA, provides:

> *"(1) Information in respect of which a claim to legal professional privilege….could be maintained in legal proceedings is exempt information".*

14. It was not in dispute that legal professional privilege applies and section 42 is engaged, thus our task has been to consider the public interest balancing test in section 2(2) of the Act. Section 2(2) provides:

> *"In respect of any information which is exempt information by virtue of any provision of Part II section 1(1)(b) does not apply if or to the extent that –*
> …..
> *(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing information".*

15. To this end, the Tribunal must consider *"all the circumstances of the case"* and to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The Tribunal reminded itself that the way in which the public interest test in section 2(2) is set out creates a presumption in favour of disclosure. The burden of proof remains moreover on the public authority to satisfy the Tribunal that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure (*DFES v IC* EA/2006/10 paragraphs 61 & 64).

16. Mr Justice Wynn Williams in the High Court case of *DBERR v O'Brien & Information Commissioner [2009] EWHC 164 (QB); [2011] 1 Info LR 1087*, an authority binding upon the Tribunal, upheld its approach in recognising that there is a significant in-built weight of public interest in maintaining the exemption under section 42. This is on account of the fundamental importance attached to legal professional privilege and thereby the protection of free and frank communications between lawyers and their clients. The judge stated at paragraphs 41 and 53 of the judgment:

> "*It is also common ground, however, that the task of the Tribunal, ultimately, is to apply the test formulated in section 2(2)(b). A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back-door" to an absolute exemption. As [counsel for the IC] submits in her Skeleton Argument, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of*

the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

……..

The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption; in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least".

17. Finally, the Tribunal explained at the hearing that it was not bound by the decision of the first Tribunal (First-Tier Tribunal decisions not being precedent setting for subsequent Tribunal decisions). Its familiarity with the issues had, it hoped, assisted, but it was important for all parties to appreciate that the matters under appeal had to be considered separately from the first hearing. Importantly there was new evidence before the Tribunal which had not been before it on the last occasion and with the passage of time, circumstances had changed.

The Public Interest Test

18. The Tribunal reviewed the public interest factors argued as being in favour of and against disclosure in order to assess whether the ICO had made a lawful decision.

Factors against disclosure

19. The factors in favour of maintaining the exemption put forward by the DWP and supported by the IC were, in summary :

(i) the significant in-built public interest accorded to legal professional privilege and thereby:

- the protection of the DWP's ability to communicate freely with legal advisors to obtain advice;

- ensuring that decisions are made on the basis of fully informed and thorough legal advice;

- the preservation of the ability of the DWP and other Government departments/agencies to defend their decisions in the event of legal challenge;

- the preservation of the general concept of legal professional privilege.

20. There was no doubt that the Tribunal was bound to find that there was a significant in-built public interest in favour of maintaining the exemption. Importantly, it was not necessary to show any risk of prejudice from the disclosure of the disputed information for the significant in-built public interest to apply.

21. The Tribunal accepted the DWP submission that, further to the *O'Brien* High Court decision, the in-built public interest in maintaining an exemption could not be diminished by the particular factors in an appeal, it could only be enhanced.

22. The DWP argued that in addition to the significant in-built public interest, there was a specific additional factor increasing the public interest in favour of maintaining the exemption, which was essentially the 'chilling effect' as it applied to Government. Thus it was argued, supported by Mr Wolfe's evidence, that were disclosure to take place the overall efficacy of legal advice provided to Government and therefore the robust nature of decision making would be lessened - in the sense that officers would be chary of written (as opposed to oral) legal advice which could subsequently be disclosed (both in terms of the written instructions and the advice given). The Tribunal took the view however that this factor was one and the same as the so-called in-built public interest, simply applied to the particular interests of Government as

opposed to a private person. Both would suffer if unable to obtain legal advice in complete confidence in the ways set out above.

23. What differed was the nature of the interests involved – Government versus private interests. Thus, DWP put forward the proposition that the obvious importance of Government's interests in this context, was such that additional weight should be given to the factors in favour of maintaining the exemption. The Tribunal struggled however with the way this was argued, vis that the Government was 'entitled' to the same level playing field in litigation as the citizen – that is, it should come to court having had the same litigation advantages that a citizen would enjoy from legal advice that was immune from any possibility of disclosure. In particular, it was argued that the Government should not be obliged to disclose the weaknesses in its case for any particular legislative or policy proposal or in relation to any challenge. This seemed tantamount to saying that, given the potential disadvantage Government faced in this regard as a result of FOIA, the way round it was to accord additional weight to the already significant in-built public interest against disclosure, just because it was Government. This would take the section 42 exemption as it applied to Government perilously close to being an absolute exemption, which it expressly was not.

24. In any event, the Tribunal considered that Government should never be in the same position as a citizen as it should always be bound to act in the public interest and in that sense, not always to chase a success in the courts. It might even be argued that in this sense the Government had less need of private undisclosed legal advice. The Tribunal recognised however that, even if "confident" of the correctness of its legal position, there would always be the possibility of speculative and/or hopeless litigation which Government was quite right, in the public interest generally (including safeguarding the public purse), to defend vigorously.

25. Thus, the Tribunal did not accept there was an additional factor on top of the in-built public interest in favour of maintaining the exemption, simply on account of the public authority being the Government and the importance of Government's functions. However, the Tribunal did accept that the importance of certain issues (of which this is one) means that there is an increased public interest in the Government getting its position right, and therefore having legal advice which is not inhibited by

the consideration that it might in future be disclosed. As an additional factor against disclosure however this would be matched the counterveiling increased public interest in openness and transparency on such issues. Thus, the effect on the public interest balancing test would be neutral.

26. DWP argued that there was an additional factor in that the disputed information was said to be 'live', in the sense that it was legal advice still relied upon. At the date of the first request, considered at the first Tribunal hearing, the then Bill was still completing its passage through Parliament ie: it was still subject to Parliamentary scrutiny. In that sense, the first Tribunal had accepted that the legal advice was live. That of course no longer applied as by the date of the third letter of request, the Bill had become an Act. It was argued by the DWP, and in turn the IC, that the legal advice remained live despite this in the sense that it would be relied upon if there were to be litigation as to the human rights compatibility of the provision in the criminal courts. Mr Wolfe put forward his view that it would take at least a couple of years before any such provision could be regarded as 'settled in' and not subject to possible challenge.

27. The first Tribunal had not accepted the then contention of the DWP that there had been a 'litigation context'. This Tribunal was bound to consider this particular issue in the light of the current appeal, the new evidence and changed circumstances. It agreed with Mr Fisher that the resolution of any human rights challenge during a criminal prosecution would, in the Tribunal's view, be resolved by argument around the authorities and legal arguments put forward in court rather than the historical advice (some of which was 7 years old at the time of request) relied upon by the Government in supporting the Bill. It was further argued that the legal advice might be relied upon by Government in relation to future legal policy or legislative initiatives. This seemed even more speculative than the litigation context argument and was rejected by the Tribunal. It did not accept therefore that the legal advice was still live and as such this was not an additional factor adding to the public interest factors against disclosure.

28. It was argued by the DWP that there was a specific risk of prejudice if the disputed information were to be disclosed (this being put forward as a separate matter to the question whether the disputed legal advice was live). It was noted by the Tribunal

however that the disputed information did not go much beyond the content of the Explanatory Notes, read with the Detailed Statement and that said by Ministers in the Houses. Disclosure of this remaining information would, in the Tribunal's view, be of minimal value to any party challenging the human rights compatibility of the provision in the courts. Indeed that which had not been disclosed would be already known to those with a reasonable knowledge of this area of law.

Factors in favour of disclosure

29. The factors in favour of disclosing the requested information were in summary:

(i) The Tribunal accepted that the introduction of a sanction of imprisonment for an offence which contained a reverse burden of proof was a matter of considerable public and legal importance, given the potential inroads to human rights. This was acknowledged by Mr Wolfe in evidence. In favour of disclosure would be a heightened need for the public to be able to reassure itself that the public authority was acting with integrity in such areas. The intrinsic importance of legislative compliance with fundamental human rights heightened the public interest in favour of disclosure.

(ii) Disclosure would promote accountability and transparency in relation to this particular Parliamentary scrutiny of proposed legislation. The Cabinet Guidance - Making Legislation, made it clear that it was the Government's practice, as a matter of policy, to make a statement equivalent to one under section 19 of the Human Rights Act 1998 in relation to Private Members' Bills that it supported. The Cabinet Guidance further provided at paragraph 11.3 that the Explanatory Notes should be *"as detailed as possible"* when assessing the impact of a measure on a Convention right and presenting the Government's reasons for concluding that the measure is Convention compatible.

(iii) The Tribunal interpreted this as meaning, as a matter of policy, that more information was required than that which appeared in the Explanatory Notes. Mr Fisher argued that the Explanatory Notes had not explained

how it was that the measure was "necessary, justified or proportionate". Mr Wolfe, very fairly, stated in evidence that the "necessary" aspect of this had not been explained as fully as he would have liked – in particular there had been no reference to the leading case of *R v Davies (David Janway)* [2002] EWCA 2949 case and the other cases which were subsequently referred to in, respectively the Minister's statement in the House and the Detailed Statement referred to in paragraph 5 above. However, it was explained by counsel for the DWP that the concept of "necessity" in this particular corner of human rights jurisprudence essentially required a "fair balancing" of the various factors, such that read in that way, one could see that the issue had been addressed. Certain balancing factors had been set out in the Explanatory Notes and had been addressed more fully in the Detailed Statement. As such, the extent to which there had been any 'information deficit', as Mr Fisher put it had been significantly diminished since the first Tribunal hearing and indeed was not, by this stage, of any material import. The Tribunal took the view that any material deficiencies in the Explanatory Notes had by the date of the third letter of request, been dealt with in the sense that the public's knowledge and understanding of the underlying reasons had been supplemented by the Detailed Statement.

(iv) As recognised in the first Tribunal, the passage of legislation had given rise to a particular public interest in the integrity of Government statements as to human rights compatibility of the proposed legislation. Disclosure during the Parliamentary debates would better enable the public through its democratically elected members to challenge any section 19 statement (or equivalent in the case of a Private Members Bill) by a Minister. As the Parliamentary passage of the Bill was over, this no longer pertained. There remained however, some, albeit less strong, ongoing public interest in the public having confidence in the Minister's Parliamentary role in this regard. However, the Tribunal noted that the correctness of the statement was a matter that could be tested in the courts such that the need for transparency was not as weighty as propounded by Mr Fisher.

(v) It was argued by Mr Fisher that the fact that the Government had chosen not to produce a statement of the Minister's reasons but rather relied upon legal advice such that the exemption at section 42 applied, was in itself a factor in favour of disclosure. If there had been any evidence to suggest that this was the Government's intention, that clearly would have weighed heavily in favour of disclosure. However, there was nothing before the Tribunal to this effect.

(vi) Finally, as was stated at the first Tribunal, its reading of the disputed information (also now taking into account the additional disputed information that was not before the Tribunal on the last occasion) dispelled any fear that the public had been misled or that the legal advice in the Explanatory Notes was a misrepresentation. Although Mr Fisher had been careful not to allege any wrongdoing either intentional or inadvertent, nevertheless the Tribunal took it upon itself to consider this issue.

Application of the public interest test

30. The Tribunal gave careful consideration to where the public interest lay, in favour of disclosure or in favour of maintaining the exemption. The Tribunal was particularly concerned, whilst acknowledging the significant in-built public interest in maintaining the exemption in section 42, not thereby to, in effect, treat this exemption as absolute.

31. The starting point in section 42 cases was the significant weight to be given to the in-built public interest in maintaining the legal professional privilege exemption. Insofar as there was an additional factor in favour of maintaining the exemption on account of the importance of the specific context (human rights compliance) this was rendered neutral by the equivalent heightened public interest in transparency/accountability and therefore in favour of disclosure. This meant that the question for this appeal was in effect whether the other public interests in favour of disclosure were at least equal to the significant in-built public interest, in which case, given the presumption in favour of disclosure, the appeal should be upheld.

32. Whilst not binding, the Tribunal found useful the indications from differently constituted Tribunals of the sorts of factors that might constitute a public interest in favour of disclosure that equalled or outweighed the significant in-built public interest arising in section 42 cases. Thus, in the case of *Fuller v Information Commissioner & Ministry of Justice* EA/2008/0005, it was said at paragraph 12:

> *"There will be some cases in which there could be stronger contrary interests; for example, if the privileged material discloses wrongdoing by or within the authority or a misrepresentation to the public of the advice received or an apparently irresponsible and wilful disregard of advice, which was merely uncongenial".*

33. A differently constituted Tribunal in the case of *Calland v Information Commissioner & FSA EA/2007/0136* stated that *"some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential".*

34. The Tribunal does not accept the DWP submission that "very little weight" can be given to the public interest in disclosure. However, in the light of the disclosure that had been made since the first letter of request, namely the Detailed Statement, the Tribunal concluded that the public interest in favour of disclosure had significantly diminished since the earlier appeal. Indeed, this was so much the case that the Tribunal did not consider the factors in favour of disclosure matched the significant in-built weight. Thus the Tribunal was of the view that the public interest in maintaining the exemption outweighed the public interest in disclosure and DWP had been entitled to withhold the legal advice.

35. The Tribunal realised this would be a disappointment to Mr Fisher, particularly in the light of the first Tribunal's indication that had it not been for the then live nature of the disputed information, it would have ordered disclosure. However, there had been considerable disclosure since the earlier appeal such that the public interests in disclosure had significantly changed. Normally this would have correspondingly reduced the public interests against disclosure (as there would be little harm in releasing the information). Given however the binding nature of the significant in-

built public interest, which was not dependent on there being any evidence of actual prejudice or a likelihood of prejudice or indeed any persuasive evidence of a chilling effect arising from disclosure in this case, the Tribunal found itself bound to come down in favour of non-disclosure.

Conclusion

36. The Tribunal upheld the IC's Decision Notice and dismissed the appeal.

Melanie Carter
Tribunal Judge

Dated: 14 March 2012