



Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0028

Freedom of Information Act 2000 (FOIA)

Heard at Procession House, London

Decision Promulgated

Date 6 December 2007

11 January 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Chris Ryan

And

LAY MEMBERS

Dave Sivers

Paul Taylor

Between

Martin Shipton

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

NATIONAL ASSEMBLY OF WALES

Additional Party

Decision

The Tribunal Upholds the decision notice dated 4 May 2006 and dismisses the appeal.

Reasons for Decision

Background

- 1 The Welsh Labour Party manifesto in 2003 included the following statement:
" In our first term we reintroduced free school milk for infants. In our second term we will provide funding for all primary school children to have free breakfast at school ..."
The final page of the manifesto then summarised ten matters that the party said that it would attend to in the next term of the Assembly. They included, as no. 5, the following:
"Provide for all primary school children to have free breakfasts in school"
- 2 On 24th May 2004 a lawyer within the Directorate of Legal Services of the National Assembly of Wales wrote a memorandum to a civil servant within the Pupil Support Division of the Assembly on the subject of the school free breakfast initiative. On 27th May 2004 the civil servant who received that memorandum wrote a submission to the Minister for Education & Lifelong Learning on the same subject. These two memoranda, which we will refer to as "the Memoranda", contain the information which forms the subject matter of this Appeal.

The request for information

- 3 On 21 January 2005 the Appellant sent an e-mail to the National Assembly of Wales in the following terms:
"I seek disclosure of all information relating to the consideration of whether the free breakfast initiative could be made compulsory so far as the participation of primary schools is concerned."
- 4 The e-mail was treated as a request for information under the Freedom of Information Act 2000 ("the Act") and the Memoranda were identified as documents that fell within the scope of that request. However, by letter to the Appellant dated 23 February 2005 the Assembly refused to disclose the Memoranda on the basis that they were considered exempt under both section 35 and section 42 of the Act and their disclosure would be harmful to the public interest to an extent that outweighed the public interest in their disclosure.

The complaint to the Information Commissioner

- 5 Following a review of that refusal, which led to the same conclusion, the Appellant complained to the Information Commissioner. He conducted an investigation and, following an unsuccessful attempt to resolve the complaint informally, issued a Decision Notice on 4th May 2006. His decision was that:
 - (a) the Memoranda were documents protected by legal professional privilege with the result that the exemption under section 42 of the Act was engaged;

- (b) the Memoranda also related to the formulation or development of government policy with the result that the exemption under section 35 of the Act was also engaged;
- (c) the public interest in disclosure of the Memoranda did not outweigh the public interest in maintaining the exemption under section 42;
- (d) in respect of section 35 the public interest arguments for and against disclosure were more finely balanced but, in the light of the decision under section 42, it was not necessary to reach a concluded view.

The Appeal to the Tribunal

6 The Appellant appealed to this Tribunal against the Decision Notice. The Assembly applied to be joined as an Additional Party, an application that was accepted and an order for its joinder was made on 20 September 2006. With the agreement of all parties the Appeal was determined without a hearing on the basis of written submissions by the parties and an agreed bundle of documents. In addition we were provided with copies of certain materials that were not made available to the Appellant. These were the Memoranda themselves and some correspondence passing between the Assembly and the Information Commissioner in the course of the latter's investigation. The correspondence was included in the agreed bundle in redacted form in order to preserve the confidentiality of the disputed information. However, we called for, and were provided with, copies in unredacted form of an earlier draft of one memorandum and an e-mail, both of which were cross referred to from the Memoranda, but which did not, in the event, add anything material to the Appeal.

Relevant statutory provisions

7 Section 35(1)(a) of the Act states –

“information held by a government department or by the National Assembly for Wales is exempt information if it relates to ... the formulation or development of government policy”.

8 Section 42 of the Act states –

“Information in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings is exempt information.”

9 The effect of section 2 of the Act is that the exemptions created by sections 35 and 42 are both qualified exemptions, with the result that the right of access to information falling within them (as provided for under section 1 of the Act), will not apply if or to the extent that *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”* (section 2(2)(b)).

The Issues

- 10 The issues arising on this appeal have been clarified in the course of the pre-hearing exchanges between the Tribunal and the Parties and are as follows:
- (a) Is the content of the Memoranda covered by legal professional privilege in whole or in part?
 - (b) Does the public interest in the disclosure of any part of the Memoranda that is covered by legal professional privilege outweigh the public interest in maintaining the exemption?
 - (c) If the whole or any part of the Memoranda is not covered by legal professional privilege then does it fall within the section 35 exemption?
 - (d) If so, does the public interest in the disclosure of that material outweigh the public interest in maintaining the section 35 exemption in respect of it?
- 11 The Assembly submitted, in the Reply to the Appeal that accompanied its joinder notice that, if we concluded that the Appellant should succeed in relation to section 42 of the Act, then the matter should be remitted to the Information Commissioner for a decision under section 35. However, in its final written submissions it said that, if it became necessary for the Tribunal to deal with the section 35 exemption, it had all information necessary to do so. The Information Commissioner himself asserted that The Information Tribunal (Enforcement Appeals) Rules 2005 give us no specific power to remit to him and that in these circumstances we should ourselves consider the matter. Our difficulty in that respect is that the Information Commissioner, having decided that both sections 35 and 42 were engaged and that he should find in favour of the Assembly under the public interest test as that applied to section 42, considered that it was not necessary for him to reach a conclusion on the public interest balance in relation to section 35. However, the relevant issues have been covered in the submissions and other papers lodged by the parties and we feel that we have enough material to make a decision on the point.
- 12 We will deal with each of the issues set out above in the order in which we have listed them.
- 13 Is the content of the Memoranda covered by legal professional privilege in whole or in part?
- (a) The Appellant has not made any positive case on this issue. It would be difficult for him to do so as, for obvious reasons, he has not seen the Memoranda. However, in his amended grounds of appeal he asks that we consider whether any of the material contained in the Memoranda falls outside section 42.
 - (b) The Information Commissioner and the Assembly have asserted that both of the Memoranda are covered by legal professional privilege.
 - (c) They say that the first memorandum constituted legal advice from a qualified lawyer employed by the Assembly addressed to an official of the

Assembly who had requested the advice and that it was requested and given in a relevant legal context. We have reviewed the document and have concluded that this is correct and that the memorandum dated 24 May 2004 is a document in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

- (d) The Appellant has suggested that legal professional privilege may not apply in this case because there was in his view no risk of any litigation resulting from disclosure. However, it is well established that legal advice is capable of being protected by privilege even though unrelated to litigation. In this respect we also rely on recent House of Lords authority, in the form of the judgment of Lord Scott in *Three Rivers DC and ors v Governor and Company of the Bank of England (no 6)* [2004] UKHL 48, which also provides valuable guidance on the nature and significance of legal professional privilege in more general terms. After reviewing some of the case law on the subject his Lordship said:

“None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients’) consent, there will be cases in which the requisite candour will be absent. ... the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers’ legal skills in the management of their (the clients’) affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else”

- (e) It is conceded that the second of the Memoranda, dated 27th May 2004, is not a direct communication from a lawyer; it is a submission to a minister from a civil servant. However, the Information Commissioner and the Assembly say that it summarises the legal advice set out in the first document and that, as the substance of the advice is set out in the submission, it retains its privileged status. In this respect they both rely on the case of *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch) In that case Mr Justice Mann had to determine the extent to which privilege applied to the substance of communications between a party to litigation and a third party where what was communicated was, or referred to, privileged advice. His general conclusion was that:

"The proper analysis, consistent with Three Rivers, is to continue to afford privilege to material which evidences or reveals the substance of legal advice."

In the course of reaching that conclusion he considered a number of circumstances in which privilege might apply beyond those involving a direct communication between lawyer and client. These included:

"... the situation where a client representative who obtains the advice passes that advice internally in the organisation in question. This would apply whether the advice is passed on verbatim or whether it is summarised or extracted."

- (f) We have again reviewed the document. It is stated to be a memorandum on the delivery of the policy in question, but it is based on, and summarises, the legal advice and is in a form such that, if all the elements of legal advice were to be redacted it would in our view be rendered meaningless. In these circumstances we conclude that this document too is one in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- (g) The exemption provided for by section 42 is therefore engaged in respect of both of the Memoranda.

14 Does the public interest in the disclosure of the Memoranda outweigh the public interest in maintaining the legal professional privilege exemption?

- (a) In his amended grounds of appeal the Appellant said:
"My original request to the Welsh Assembly Government (WAG) sought 'disclosure of all information relating to the consideration of whether the free breakfast initiative could be made compulsory so far as the participation of primary schools is concerned'. ... my intention was to establish whether one of the Labour Party's key pledges at the National Assembly election in 2003 could be lawfully delivered. The promise was that, if elected, a Labour administration would fund a free breakfast for every primary school child in Wales. Clearly such a promise would be meaningless if the WAG was unable to deliver on it lawfully."

That appears to us to over state the pre-election promise, as it appeared in the party's manifesto, but it was the basis for the Appellant's argument that the Information Commissioner had given too much weight to factors favouring the maintenance of the legal professional privilege exemption and not enough to the countervailing factors of democratic accountability and political integrity. Against that the Information Commissioner and the Assembly have both stressed the strong element of public interest, which they say underlies legal professional privilege. They rely on the passage from *Three Rivers* referred to in paragraph 13(d) above, as well as earlier case law in which the importance of legal professional privilege to the administration of justice has been stressed. We were also referred to the decision of a differently constituted panel of the Information Tribunal

in the case of *Bellamy v Information Commissioner and the DTI* (EA/2006/0023), which included the following statement:

“...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.”

- (b) We are not bound to follow other Information Tribunal decisions but accept the passage quoted as broad guidance on the care that should be taken to ensure that freedom of information principles do not undermine the well established common law right, which enables a public authority to put all relevant facts before its legal advisers, and to receive advice based on them, without fear that either the facts or the advice will be disclosed to others without its consent. At the same time we are conscious, as the Appellant reminded us, that the section 42 exemption is not an absolute one and that, if the qualified nature of the exemption is to have any meaning, there will be occasions when the public interest in disclosure will outweigh the public interest in maintaining privilege. This may arise, for example, when the harm likely to be suffered by the party entitled to legal professional privilege is slight or the requirement for disclosure is overwhelming. But there may be other cases where the issue is less clear cut. In the present case the Information Commissioner has argued that we should consider both general principles and specific factors unique to the circumstances of this case. However, neither he nor the Assembly has, to our mind, put forward any convincing argument that the Assembly will suffer specific harm if the content of the Memoranda were to be disclosed. Their case therefore relies on the general principle that disclosure would discourage public authorities from taking legal advice in the future, or from having an open discussion on legal issues with its advisers.
- (c) The Information Commissioner and Assembly have also asserted that the public interest in disclosure has been diluted because, in an attempt to meet the Appellant's request for information, the Assembly has already disclosed that the legal position was that schools could not be compelled to provide breakfast free of charge under the current statutory framework and that the possibility of attempting to amend the relevant statutory provisions had been considered, but rejected. The Appellant said, in his own Grounds of Appeal "It is not difficult, even without sight of the legal advice, to reach the conclusion that the advice [set out in the Memoranda] confirmed that [Local Education Authorities] and schools could not be compelled to take part in the initiative." He argues, on that basis, that if the substance of the advice can be easily deduced it should be more difficult to justify keeping it secret under the public interest test. Against that it is said that, as the Appellant has been provided with the information necessary to ensure that the principle of scrutiny and democratic accountability is maintained, there is no need to go further and disclose the detail that underpins the advice. In the Information Commissioner's written submissions the point is put in this way:

“The issues raised by the Appellant can be pursued and debated whether or not the disputed information is disclosed to him. It is not easy to see how the Appellant or the public in general will be in a stronger position to advance any debate about the issue of free school breakfast if the disputed information sought is disclosed”.

- (d) We have concluded that the Assembly would not be at risk of suffering any specific harm if the Memoranda were to be disclosed. This is not a case where disclosure would undermine the case that it would otherwise be able to make out in the course of litigation or would expose it to the risk of a claim or complaint, which would not otherwise arise. The determining factor in favour of maintaining the exemption is therefore the general policy issue summarised in (b) above. Notwithstanding that relatively weak argument against disclosure we consider that the public interest in disclosure is even weaker in view of the disclosure already made, as mentioned in (c) above.
- 15 In view of the conclusion we have reached in respect of the section 42 exemption the information in dispute will not be disclosed and it is not strictly necessary for us to consider section 35. We do so, however, in case it were to be decided, on appeal from our decision, that either the whole or part of the Memoranda falls outside the scope of legal professional privilege.
- 16 If the whole or any part of the memoranda is not covered by legal professional privilege then does it fall within the section 35 exemption?
- (a) The Appellant does not dispute that the Memoranda are covered by section 35 and we conclude that the exemption is engaged.
- 17 If section 35 applies, does the public interest in the disclosure of that material outweigh the public interest in maintaining the exemption in respect of it?
- (a) The Appellant suggests that the public interest factors in favour of maintaining the exemption are weaker when the case against disclosure is based on the formulation or development of government policy than in the case of legal professional privilege. In support of the point he stresses that the public policy in question has been settled, with the result that it is inconceivable that the integrity of the policy formulation and development process could be compromised by disclosure of the Memoranda at this stage. It was not accepted by the Assembly that the process of policy formulation was at an end and the Assembly argued that the policy was in phases with the result that its development was ongoing.
- (b) Against the Appellant’s general point in favour of disclosure the Assembly has spelt out the harm which it says would result from disclosure namely:
- (i) staff would be less likely to explore speculative policy options;

- (ii) any analysis of a policy position is frequently revisited during the formulation and development and closing stages of policies and premature disclosure could result in closing off discussions and hampering the development of different options;
 - (iii) the Assembly's Ministers and officials must be able "to think in private".
- (c) In his Decision Notice the Information Commissioner concluded that the public interest arguments under section 35 were finely balanced. We agree, but have concluded that, in the particular circumstances, the factors in favour of maintaining the exemption do not outweigh those in favour of disclosure. Accordingly we decide that, had section 35 been the sole determining provision, we would have ordered the Memoranda to have been disclosed.

Signed

Date 11 January 2007

Chris Ryan

Deputy Chairman