Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0048

Freedom of Information Act 2000 (FOIA)

Decision Promulgated 16 February 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Chris Ryan

and

LAY MEMBERS

Andrew Whetnall

Gareth Jones

Between

Dr CHRISTOPHER T HUSBANDS

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision

We have decided, as a preliminary issue, that part of the information requested is not exempt from disclosure under FOIA section 42. It remains to be decided whether it should nevertheless be treated as exempt under FOIA section 41 and, if so, whether the public interest in maintaining that exemption outweighs the public interest in disclosure. That issue was not investigated by the Information Commissioner in the course of his investigation into the Appellant's complaint and we accordingly direct the parties, pursuant to Rule 14 of the Information Tribunal (Enforcement Appeals) Rules 2005, to lodge with the Tribunal by no later than [date 21 days after promulgation] written submissions on the question of whether section 41 applies to the non-privileged material and, if so, on the application of the public interest test

Reasons for Decision

Introduction

1. This Appeal concerns a request by the Appellant for certain information contained in bills for legal services delivered to Cardiff University ("the University") in relation to employment disputes between the University and two of its academic staff. In the case of one of those disputes the Appellant now accepts that the copy invoices previously provided to him contained all the information that exists as to the detailed work in respect of which the invoice was raised. As the matter comes before this Tribunal, therefore, the Appellant's case relates to the bills delivered in respect of only one employment dispute, being internal disciplinary proceedings and an Employment Tribunal case involving an individual who has been referred to throughout as Professor B. We understand that the case has not yet been concluded.

2. The central issue is whether the information requested is covered by legal professional privilege, so that it falls within the exemption provided by section 42 of the FOIA and, if so, whether the public interest in maintaining the exemption is outweighed by the public interest in having the information disclosed. A secondary issue is whether the information falls within the exemption provided by section 41 of the FOIA (confidential information) and, if so, whether the public interest in maintaining that exemption is outweighed by the public interest in having the information disclosed.

The relevant Sections of the FOIA.

3. Section 1 of the FOIA provides that any person making a request for information to a public authority is entitled to be informed whether it holds information of the description specified in the request, and, if so, to have that information communicated to him or her.

4. That broad right to disclosure is modified by section 2, which provides:

> *"(2) 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-*
>
> > *(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
> >
> > *(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

5. Both sections 41 and 42 are qualified exemptions, so that if we decide that they apply we have to go on to apply the test set out in section 2(2)(b) by deciding whether the public interest in maintaining the relevant exemption outweighs the public interest in disclosure.

6. 42 of the FOIA is as follows:

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

7. Section 41 of the FOIA is as follows:

> *"(1) Information is exempt information if-*
>
> *(a) it was obtained by the public authority from any other person (including another public authority), and*
>
> *(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

<u>The request for information</u>

8. The request for information in respect of Professor B. was contained in a letter from the Appellant dated 7 January 2005 in which he explained that he was writing "on behalf, and with the authority, of Professor B" and that he wished to "exercise my right and Professor [B]'s right, as joint and several applicants" under the FOIA to be provided with:

> "documentary or other appropriate evidence to show all monies, itemised as individually billed by the payee or payees concerned, spent by Cardiff University for any external legal advice (including that from solicitors, legal counsel, or whomever) in connection with all aspects of the ongoing case of [Professor B's] suspension by Cardiff University since 22 January 2004; this request includes all monies spent since that date or from any earlier date upon which Cardiff University may have received external legal advice"

9. By letter dated 2nd February 2005 the University confirmed that it held information detailing the University's expenditure on external legal fees in respect of the case of Professor B but that it had decided not to disclose the information on the grounds that it fell within section 42 of the FOIA because, it contended, legal fees were covered by legal professional privilege. The University acknowledged that in applying the exemption it was required to balance the public interest in withholding information against the public interest in disclosing it, but concluded that there was no public

interest in disclosing the information the Appellant had requested. The Appellant asked for an internal review of that decision in a letter dated 5th February 2005 in which he challenged the University's argument that legal professional privilege applied because, he said, "Legal professional privilege covers the substance of confidential legal advice, not the amount of money spent in obtaining it - which is solely what my request had been for." He also said that there were strong public interest reasons for disclosing information about how much money the University had spent on the dispute in question.

10. By letter dated 18th February 2005 the Director of Corporate Services and University Secretary wrote to the Appellant and informed him that he had completed the internal review and had concluded that the original decision to reject the request for information had been correct in that the bills of cost in question were privileged and that the public interest in withholding information relating to the expenses incurred by the University in relation to the dispute involving Professor B outweighed the public interest in releasing the information.

The complaint to the Information Commissioner

11. The Appellant presented a complaint to the Information Commissioner on 1 April 2005. In the course of responding to a request from the Information Commissioner for further information, as part of his investigation into the complaint, the University stated that it wished to rely on an additional ground to justify its refusal to release the information requested, namely, the exemption provided by section 41 of the FOIA in respect of information obtained in confidence from a third party.

12. The complaint was received at a time when the Information Commissioner's office was evidently very busy and it was unfortunately not until the 5 July 2006, some 15 months later, that it issued a Decision Notice on the matter. The Decision Notice recorded that Professor B had been suspended by the University and had presented a case against the University to the Employment Tribunal, which was still pending at the date when the request was received. It also recorded that the University had agreed to release to the Appellant copies of the legal bills presented in respect of another employment dispute because in that case the matter had been concluded, with the result that the public interest in maintaining the legal professional privilege exemption was thought to bear less weight. However, in the case of Professor B the University considered that disclosure of the details of legal fees incurred in connection with both internal disciplinary proceedings and external tribunal proceedings would disadvantage it in the context of continuing litigation.

13. The Information Commissioner, having apparently inspected the bills in question, recorded that the Appellant had made it clear that he required a detailed breakdown

of legal costs incurred by the University, not simply a global figure for the amounts charged. On that basis he decided that the information requested fell within the exemption provided by section 42 of the FOIA. He expressed the view that legal professional privilege applied to bills of costs which contained a detailed narrative of work carried out, as well as figures for the amount charged. Having concluded that the section 42 exemption was therefore engaged, the Information Commissioner went on to consider the public interest arguments for and against maintaining the exemption. He acknowledged that there was a public interest in the way that educational establishments spent public money but considered that there was a strong generic public interest in maintaining the section 42 exemption based on the importance of clients being able to communicate with their legal advisers in confidence. In addition he said that there was a specific disadvantage likely to be suffered by the University in that disclosure of a detailed breakdown of legal charges could be advantageous to Professor B, in disclosing information on tactics and strategies adopted in pursuing the University's case. He concluded that the public interest that advice on matters such as disciplinary procedures and employment disputes should be obtained without the prospect of details of the work being disclosed outweighed the public interest in disclosure. In relation to the section 41 exemption the Information Commissioner expressed the view that, in the light of his conclusion under section 42, there was no need for him to consider the separate, confidential information, exemption.

The appeal to the Tribunal

14. The Appellant lodged an appeal against the Decision Notice on 24 July 2006. In the Grounds of Appeal which accompanied his Notice of Appeal he argued that the section 42 exemption was not engaged and that, if it was, the Information Commissioner should have decided that the public interest in disclosing the information requested outweighed the public interest in maintaining the exemption. He also included arguments in respect of section 41, in case, despite the decision of the Information Commissioner not to deal with that aspect of the case, it might be resurrected in the course of the Appeal.

15. By agreement between the parties the Appeal has been disposed of without a hearing, on the basis of detailed written submissions and an agreed bundle of documents.

16. There appears to be some confusion about precisely what information the Appellant has been seeking. The Information Commissioner has pointed out that the original request was for itemised accounts that would provide the Appellant with a detailed breakdown of the work that was carried out by the University's lawyers. That certainly appears to have been the Appellant's approach when he made the original

request but it is clear that, as the case reaches us, his position is that, while he would prefer to see what he has described as the "constituent amounts" going to make up the bill and justify the charge, he would understand a more limited disclosure if we decide that this is necessary in order to protect privileged information. Indeed, in his written submission to us he has criticised the Information Commissioner on the ground that, if he considered that the original request was so broad that it would encompass material to which privilege would attach, he should have ordered partial disclosure by requiring the bills to be released with any sensitive material redacted. In fact he goes so far as to concede that the extent of redaction might have been such that the only information made available to him would have been the amounts charged in each of the invoices in question. However, he argues that if we decide to uphold privilege in principle we should not apply a blanket exemption to the invoices in question but should consider whether each item of information set out in them is entitled to be protected under the law of privilege. The Information Commissioner argues that he should not be criticised for failing to reach a decision on whether a redacted version might have been released because the Appellant was plainly seeking disclosure of the detailed, itemised account. However he has also submitted that if we do order limited disclosure we should ensure that whatever is released is of a "neutral nature".

17. The Tribunal's powers on hearing an Appeal are set out in FOIA section 58, which is in the following terms:

> *"(1) If on an appeal under section 57 the Tribunal considers—*
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based".*

We therefore have wide powers to review the Information Commissioner's decision and to reach our own conclusion on the appropriate level of disclosure. We do not think that it is right to say, as the Information Commissioner appears to have done, that the insistence by an Appellant that he be given full disclosure precludes the ordering of a more limited disclosure, if that is thought appropriate in all the

circumstances of a case. In the present case we are further encouraged to follow that course in view of the Appellant's current position, as mentioned above, which seems to be that, while his first preference would be to have all the information requested, he understands that it may be necessary to disclose the bills in redacted form.

The questions for the Tribunal

18. Against that background we have to answer the following questions in order to determine the Appeal:

    a. Was the information Commissioner wrong in concluding that the information requested was covered by the qualified exemption under section 42, on the ground that it was subject to legal professional privilege;

    b. If the Information Commissioner was right on the first question should he nevertheless have ordered the information to be disclosed on the basis that the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information;

    c. If and to the extent that any information set out in the bills should not be protected from disclosure on the grounds set above did that information fall within the exemption provided under section 41 FOIA and, if and to the extent that it did, would the public interest in maintaining that exemption outweigh the public interest in having the information disclosed.

19. Before we deal with those substantive issues we wish to deal with a preliminary issue. The Information Commissioner alleges that the Appellant's request for the information was made on behalf of Professor B and that he was not therefore a person who could be said to be disinterested in the litigation to which the invoices relate. The basis for the allegation is the references made to Professor B in the original letter quoted from in paragraph 8 above. The Appellant has argued that the motive of the person making a request for information ought to be irrelevant and has made the point that if it was a relevant consideration then those making requests in the future would simply conceal the reason for the request. We agree with him. We do not think that the motive which may lie behind a request for information should influence our decision. If we order disclosure of the information requested we must do so on the basis that it is disclosed to the public as a whole, and not just to the person who made the original request. It is therefore the consequences of the disclosure that we must consider, not the Appellant's reasons for making the request in the first place.

20. We will deal with each of the issues in the order in which we have set them out in paragraph 18 above.

Is the information covered by legal professional privilege?

21. We have been provided with a large number of authorities on this issue and extensive written submissions. We believe that we should start with a recent statement on the subject by the House of Lords. It was made in the in *Three Rivers DC and ors v Governor and Company of the Bank of England (no 6)* [2004] UKHL 48 and appears in the judgment of Lord Scott. After reviewing case law authority from the courts of this country and several Commonwealth jurisdictions he 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"*

22. It is clear from earlier sections of the judgment that the passage quoted was intended to provide broad guidance on the policy reasons for the continued existence of legal advice privilege in the face of some doubts on the point that had been expressed in the court below. It represents a recent statement of the law on this subject emanating from the most authoritative source available. We believe that we should treat it as the basis upon which we should decide this aspect of the Appeal. In other words we should consider whether disclosure of the information set out in the bills in question would expose to public scrutiny any of the facts placed before the University's lawyers with a view to obtaining legal advice, or any part of the advice itself. We also

take due note of the guidance provided in the Court of Appeal decision in *Belabel v Air India* [1988] 2 All E R to the effect that privilege is capable of attaching to a broad range of materials created as part of the necessary exchange of information between solicitor and client in the course of handling a legal transaction or dispute, and not just to communications that specifically seek or convey legal advice.

23. We should add, for completeness, that elsewhere in his judgment in *Three Rivers* Lord Scott suggests that privilege is absolute in that it “cannot be overridden by some supposedly greater public interest”. We have to interpret those words in the light of FOIA section 42 which, as we note elsewhere in this Decision, is a qualified exemption, with the result that it is possible that, in appropriate circumstances, privilege will be overridden following the application of the public interest test set out in FOIA section 2(2)(b).

24. It seems to us that *Three Rivers* and *Belabel* provide a more reliable basis for our determination than the other authorities presented to us. It is true that some of those authorities related specifically to lawyer’s bills and could be said to be of very direct relevance to the facts of this case. However, there seemed to be very little difference between the parties’ positions on whether lawyers’ invoices, as a class of document, require to be given special treatment as being either more or less deserving of having the law of privilege extended to them. In his final submission to us the Information Commissioner stated:

    > “It is not and has never been the [Information Commissioner’s] case that all solicitors’ bills are subject to legal privilege irrespective of their content and the general circumstances”

    In his submissions the Appellant made it clear that he was not suggesting that lawyers’ invoices were not entitled to privilege as a class of documents but that those in this case may have to be disclosed in modified form in order to remove indications of the nature of the legal advice given to the University.

25. It seems to us that both parties are therefore really saying that lawyers’ invoices are not to be treated, as a class, as being either covered by privilege or excluded from it. Nor is either side saying that they should, again as a class, be treated as being either more or less deserving of being protected. They both appear to agree that we should approach them as we would any other type of document and apply the appropriate test to the information that they contain. In this respect we can detect no material difference between either party’s position on the point and the following summary set out at paragraph 23-73 in the current (16th) edition of Phipson on Evidence:

> *"There can be no doubt that solicitors' bills are capable of attracting privilege if their contents betray or may betray the nature of the legal advice given, and that such an analysis is consistent with the Balabel approach. It is suggested that a blanket rule is neither necessary nor consistent with modern principles of privilege. The way in which bills are submitted is a matter of practice and will vary with time, and there is no reason why the court should be hidebound by old authorities. If a bill of costs does not reveal anything as to the contents of the communications between lawyer and client, why should it attract privilege?"*

26. We do not therefore find it necessary to explore some of the submissions made to us in respect of matters as diverse as the reputation of individual judges responsible for judgments in certain 19th century cases, the development of the text from one edition to another of certain leading texts, the authorship of each of those editions and the rigour the author may or may not have applied in reviewing and verifying sections of text which underwent no, or minimal, change from one such edition to another.

27. We therefore turn to consider the detail of the bills in question in this Appeal, noting that although they were made available to us they were not, for obvious reasons, disclosed to the Appellant, with the result that he has not had an opportunity of making any submissions on their detailed content. There are two bills each of which comprises a one page VAT invoice which sets out the sums due in respect of professional charges, disbursements and VAT. It contains no reference to the work undertaken; it simply states that the professional charges are for "advice and services rendered in the above matter". Separately, the University was sent detail of the work undertaken. In one case this took the form of a letter which summarised the activity undertaken during the period of time covered by the bill. In the other case it was a schedule having five columns headed "Fee Earner", "Date", "Hours spent" "Description [of the work undertaken by the fee earner in question during those hours]" and "Value". Neither the letter nor the schedule contains a great deal of detail and we have asked ourselves whether they really disclose very much about either the facts disclosed by the University to the lawyers, the advice given based on those facts or the resulting litigation strategy developed by client and lawyer. However, we are conscious that we know very little indeed about the nature of the dispute between the University and Professor B and it may be that an element of information that seems insignificant to us might betray very much more to a person familiar with the issues at stake. It seems to us that even the amount of effort apparently applied to the case by an individual fee earner during a particular period of time might disclose much to an opponent in litigation, but nothing to an outsider. In those circumstances we have concluded that the whole of the letter and schedule describing the work undertaken is protected from disclosure by legal professional

privilege and that the exemption provided under section 42 FOIA is engaged in respect of those two documents. However, we do not believe that the same applies to the two single-page VAT invoices. They are not privileged in our view.

28. The Appellant made a further submission on the issue of privilege. He speculated whether one or more of the exceptions to the application of legal professional privilege to a bill of costs rendered by a solicitor might apply. In this he relied on an extract from Halsbury's Laws of England which states that a bill of costs might not be privileged insofar as the information that it contained might extend to (1) what took place in the presence of the opposite party, or (2) communications with the opposite party. On that basis, he argued, the Information Commissioner should have considered disclosing information set out in the bills of cost in question, which fell within one or other of those exceptions. We are not entirely comfortable with that argument applying in circumstances where disclosure would be made to a third party and not to the opposite party itself but, in the light of the conclusion we reach on this point below, we do not need to pursue our concern further.

29. The Information Commissioner has criticised the Appellant for not providing any evidence in support of his argument on this point. That was an unfair criticism. The Appellant has not seen the bills in question and has to rely on the Information Commissioner, and now us, to review them and decide whether they contain anything that falls within either of those two exceptions. The two single-page VAT invoices do not, of course, include any information. The letter and schedule justifying the lawyers' charges do make one or two passing references to matters which could be said to fall within the exceptions. However, if the documents were to be disclosed with all information redacted, save for the very few words mentioning a meeting with, or communication to or from, Professor B, they would have become quite meaningless and we believe that the whole of their content should therefore be treated as privileged.

<u>The Public Interest Test</u>

30. Before considering the public interest test we must again deal with the question of motive as a preliminary issue. The Information Commissioner argues that it is relevant to both sides of the public interest balance. First, he says that the ulterior motive which the Appellant had in requesting the information on behalf of Professor B undermines any public interest argument on which the Appellant relies. Secondly the Information Commissioner argues that his own case in favour of maintaining the exemption is strengthened by the fact that disclosure was not sought (he alleges) by a person who is disinterested so far as the litigation is concerned but was requested on behalf of the very person who is claiming against the University in the litigation. He says that it cannot be right that the Appellant can use the appellate procedure

under FOIA to obtain information which "is plainly being sought on behalf of Professor B to gain … an unfair advantage in that litigation". However, we think that motive is again irrelevant on both of these issues. As to the first, if the Appellant puts forward an argument as to why the public may have a legitimate interest in receiving the information in question we should not dismiss it, or give it less weight, because we suspect that he may not have any real concern on the point, or that such concern as he does have is outweighed by other motivation. The argument is either a well reasoned one or it is not. As to the second argument, we think that we should concentrate on the result of any disclosure and not the motivation for the request. If the outcome of a decision in favour of the Appellant will be that information will be released to the public, then we must proceed on the basis that this means that it will come to the notice of every member of the public, including any individual who might thereby secure a litigation advantage. If the public authority in question is engaged in litigation, and the information requested would provide the opponent in that litigation with an advantage, then we must weigh in the public interest balance the public authority's resulting disadvantage. The fact that there are good grounds for assuming that in this particular case the route of communication to such a litigant will be direct and immediate need not therefore influence our decision on the point.

31. The argument put forward by the Information Commissioner in support of the public interest in maintaining the exemption has as its starting point the importance of legal professional privilege to the rule of law. On that point he relies on the judgment of Lord Scott in *Three Rivers* quoted above. He also draws attention to the statement in the decision of a differently constituted Information Tribunal in the case of *Christopher Bellamy v Information Commissioner* (EA/2005/0023) to the effect that *"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".* In another Information Tribunal case – *Martin Shipton v Information Commissioner* (EA/2006/0028) – a differently constituted panel accepted that passage as broad guidance on the point but added:

> *"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."*

32. The Information Commissioner seeks to reinforce the general policy argument in favour of maintaining the exemption by the particular damage which he says the

University is likely to face if its opponent in the litigation in question were to obtain the information set out in privileged material.

33. The Appellant casts doubt on the seriousness of the harm likely to result from disclosure and argues that it is, in any event, outweighed by the public interest in disclosure. He says, first, that there is a general public interest in the way that educational establishments spend public money. In addition he says that there is a particular interest affecting two sectors of the public. The first sector is said to be employees of Cardiff University who have, he says, a legitimate interest in knowing how the University spends its money, since what was spent on legal fees could not be spent on other matters that the employees might prefer. The second constituency is said to be those from the wider population in Wales who have had no direct contract with the University but nevertheless have an interest in how a major employer in Wales uses its funds. He also made the point that if the information requested could be modified so as to remove any indication as to the nature of the legal advice given then the public interest in not disclosing it would be significantly reduced.

34. We have concluded that public interest arguments in favour of maintaining privilege over the letter and schedule outweigh the public interest in disclosing the information they contain, particularly as the disclosure of the non-privileged single-page VAT invoices will provide the public with the information it needs in order to inform any debate on the University's pattern of expenditure. Our conclusion that the single page VAT invoices can be disclosed, subject to further consideration of the applicability of section 41, is more an act of editing that application of the balancing test, as there is nothing in the VAT invoices, once shorn of the accompanying itemisation, that can reveal either the facts put to legal advisers by the client, or the nature of the advice given.

The application of section 41.

35. The effect of our decision under section 42 is that we must now consider whether the two single-page VAT invoices contain information which was obtained by the University from a third party and, if so, whether that third party would have a sustainable claim for breach of confidence were they to be disclosed other than under the protection provided under the FOIA itself. For the reasons given this issue was not addressed in the course of the Appeal and we believe that we should not dispose of it finally until each side has had an opportunity to make submissions to us on the point. Given that the only third party involved would appear to be the firm of lawyers who rendered the bills to the University we do not think that the parties will need very much time for this purpose, although the Information Commissioner will obviously need to communicate with the University. We therefore direct that the Appellant and

the Information Commissioner lodge with the Tribunal by no later than [date 21 days after promulgation] written submissions on the question of whether section 41 applies and, if so, on the application of the public interest test

CHRIS RYAN

Deputy Chairman Date 16 February 2007