Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0005
Information Commissioners Ref: FS50142679

Freedom of Information Act 2000 (FOIA)

Determination without oral hearing
On 21st July 2008

Decision Promulgated
5th August 2008

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

DAVID FARRER Q.C

And

LAY MEMBERS

ROGER CREEDON AND HENRY FITZHUGH

Between

JONATHAN FULLER

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

MINISTRY OF JUSTICE

Additional Party

Representation:

For the Appellant: Acted in person
For the Commissioner: Ben Hooper
For the Ministry of Justice: Unidentified

Decision

1 This appeal is dismissed.

Reasons for Decision

The Information Commissioner is referred to as "the IC" and the Additional Party as "the MoJ", whether before or after the transfer of responsibilities from the Home Office in 2007. "FOIA" is the Freedom of Information Act, 2000.

2 The Background

In August 2005 the Home Office issued a consultation paper, "Consultation: On the possession of extreme pornographic material", which invited views on the application to such material of criminal provisions broadly corresponding to those already enacted in respect of indecent images of children. The Executive Summary indicated the Government `s intention to tackle the issue on the demand side by discouraging interest in material depicting serious sexual violence, serious violence in a sexual context, necrophiliac acts and sexual relations with animals.

3 The proposals represented a significant development of the law in this area, since the "deprave and corrupt" test involved in the judgement of obscenity would not apply and the act of simple possession, previously outside the reach of the criminal law, would now be subject to grave criminal sanctions. Consensual activity was clearly included within the proposals.

4 Such proposals [amended in the light of the consultation exercise – see para 39 of MoJ submission], which were in due course enacted as section 63 of the Criminal Justice and Immigration Act, 2008, clearly raised issues of human rights, most obviously in relation to the rights enshrined in Articles 8 (private life) and 10 (freedom of expression - the right to receive information) of the European Convention on Human Rights and Fundamental

Freedoms. Paragraph 57 of the consultation paper addressed such issues quite shortly, concluding that they were compatible.

5 As the authors of the consultation paper expressly foresaw, their proposals generated considerable public interest and, in some cases, concern. The appellant is a member of a group entitled "backlash" which describes itself as committed to "uphold(ing) the Human Rights Act". In November, 2005, it obtained an opinion from Mr. Rabinder Singh Q.C., an acknowledged expert in the field of human rights, as to the compatibility of the proposed enactment with individuals ` rights under Articles 8 and 10. Like the other parties to this appeal, we have seen his opinion, which is dated 18th. November, 2005.[1] Its conclusion, emerging from close and cogent argument, was that the legislation proposed "gives rise to real concerns as to its compatibility " with the rights identified above.

6 The Request

On 14th. November, 2005, the Appellant had served on the MoJ, within his response to the consultation document, three requests for information of which one was later the subject of a complaint to the IC and now of the appeal to this Tribunal. It read :

"Request for any legal advice which confirms that the possession of (*presumably, material depicting.)* **consensual sado – masochistic violent sex can successfully be prosecuted and that Article 8 does not apply."**

7 A Refusal Notice was issued on 24th. February, 2006. In relation to this request, it simply stated that internal legal advice was not normally disclosed and indicated where a discussion of the human rights issues could be found. Following an internal review, a letter dated 25th. October, 2006 specified that the Home Office was refusing to confirm or deny that it had the requested information, since to do so would either indicate or suggest the content of the advice which it had obtained, depending on the thrust of such advice. It further invoked FOIA s. 35(1)(c) and (3), which no longer concern us. It set out the public interest objections to disclosure in some detail.

8 Mr. Fuller complained to the IC. Following inquiries recounted in the Decision Notice, the IC issued that Notice on 5th. December, 2007. He concluded that the Home Office was entitled to treat this request as relating to the substance of the advice which it held, not

[1] Indeed, it was published on the "backlash" website.

simply the question whether it had obtained advice at all. Section 42 was therefore engaged. He further decided that the public interest in withholding the content of such advice outweighed the public interest in disclosure. He referred to the decision of this Tribunal in *Bellamy v I.C. and D.T.I. EA/2005/0023* and set out the general arguments of principle for not disclosing. Accordingly, he rejected the complaint, whilst finding a series of breaches by the Home Office of s.17(1) of FOIA, which do not concern us.

9 Our Decision

The evidence before us was relatively compact and consisted entirely of documents. It included the consultation paper and Mr. Rabinder Singh `s opinion.

10 Two issues required determination :

(i) Was s.42 engaged (though this was not expressly disputed by Mr. Fuller)?

(ii) If so, was the public interest in withholding the information shown to be stronger than the interest in disclosure?

11 As to (i), whether legal advice has been obtained is a question which does not, of itself, give rise to issues of legal privilege[2]. Where, however, a request is framed so as to require the public authority to disclose in its answer, by implication, the general effect of that advice, then we agree with the IC that issues of legal advice privilege arise. Where a government department must clearly have been advised, a request, as in this case, to state whether it holds advice confirming a specified opinion is a request to disclose the broad thrust of the advice which it has received. Section 42 is therefore engaged.

12 Section 42 provides a qualified exemption for privileged material. The public interest in protecting privilege has been considered in a series of tribunal decisions, beginning with *Bellamy* (see above). They do not require detailed citation here. The most important principle emerging from that decision is that the very fact that a document is privileged is of significant weight in the balancing exercise. That is because the justification for privacy, recognised by the courts for centuries, is the need for candour, for a free flow of

[2] This determination proceeds on the almost inevitable assumption that the MoJ had obtained advice on these issues, whether internal or independent. It has not, however, acknowledged that this is so. The request, as formulated, required no such acknowledgement.

information, for a dispassionate review of strengths and weaknesses and for uninhibited advice in the relationship between lawyer and client. Such are the factors relied on here by the MoJ. They are as weighty in the case of a public authority as for a private citizen seeking advice on his position at law. 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. This appeal, on the evidence before us, features nothing of that kind.

13 What arguments then are advanced in favour of disclosure? Three points were made in a letter annexed to the grounds of appeal :

(a) Given Mr. Rabinder Singh `s advice, it is right that the advice received by MoJ should be disclosed so that the public can judge the strength of its case on compatibility. If the proposal as implemented (now s. 63) is incompatible, large sums will be paid in compensation, which could be saved by disclosure.

(b) The proposed legislation would destroy lives and drive some to suicide, who were engaged in nothing worse than private consumption of material portraying consensual behaviour.

(c) Disclosure would show that the Minister who certified compatibility, when the bill was introduced to Parliament, was lying.

By e mail which arrived very late and which we first saw after our deliberations had taken place, Mr. Fuller summarised his position further. He suggested that the IC had implied that he should be satisfied with the consultation process. We do not read the Decision Notice in that way. He criticised the IC for failing to explain why he regarded the MoJ `s case for maintaining privilege as stronger than the case for disclosure. He said that the provision unfairly discriminated against a single minority, namely those who wished to engage in and watch in private consensual sado – masochistic behaviour. He asserted that this was the clearest possible case for the Tribunal to find that the public interest favoured disclosure, notwithstanding legal professional privilege and that, if it did not do so, it should say that it would never rule in favour of disclosure under s. 42 so as to save everybody much time and money.

14 Despite the timing of these submissions, we have taken account of them in reaching our decision.

15 We acknowledge the cogency of Mr. Rabinder Singh `s opinion but fail to see that it represents an argument for disclosure. The fact, if it was a fact, that the Government was wrongly advised and followed that advice, is no reason to require its publication. If the government is wrong, then its error could be established through a declaration of incompatibility issued by the High Court. We do not understand how compensation could be involved.

16 Whether or not suffering was or is being caused by the creation of the s.63 offence, any such suffering would result from Parliament `s decision, not from the correctness of the advice which the government received. Why the publication of the advice that it received would have caused a change of heart in the Home Office or the MoJ, we simply do not understand. Members of the public could freely study Mr Rabinder Singh `s opinion on the backlash website so as to inform themselves of the possible problems with Articles 8 and 10 and, if they chose, lobby against s.63.

17 The disclosure of the advice received would not demonstrate that the certifying minister lied. At most, it would establish, if inconsistent with the minister `s certificate, that it had been disregarded. There is, however, no evidence to suggest that there was any such inconsistency.

18 The IC `s reasons for weighing public interests as he did are not material to our decision, provided we agree with his decision. However, we see nothing in this point anyway. The IC set out carefully the arguments on both sides and explained why he attached the importance to the principle of legal professional privilege that he did.

19 The group identified by Mr. Fuller does not appear to us to be affected by this legislation in any different way from other users of pornographic material. The ingredients of the offences are the same

20 Each case will be viewed on its own facts. Where disclosure should take place in the public interest, this Tribunal will order disclosure..

21 In our opinion the conventional arguments in favour of maintaining legal privilege easily outweigh the contrary arguments in this case.

22 For these reasons we dismiss this appeal.

David Farrer Q.C.

Deputy Chairman

Date 4th. August, 2008