Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000 and Regulation 18 of the Environmental Information Regulations 2004

Information Tribunal Appeal Number: EA/2009/0039
Information Commissioner's Ref: FS50148602

Determined on papers
On 30 September 2009

Determination Promulgated
15 October 2009

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

Jenni Thompson and Malcolm Clarke

Between

DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject areas covered:

Public interest test, Reg 12(1)(b)

Presumption in favour of disclosure, Reg 12(2)

Exceptions, Regs 12(4) and (5)

-Internal communications 4(e)

-Legal professional privilege (5)(b)

-Breach of confidence (5)(d)

Cases referred to:

DBERR v Information Commissioner EA/2007/0072 (29.4.08)

DfES v Information Commissioner EA2006/0006 (19.2.07)

Export Credit Guarantee Dept v Friends of the Earth [2008] EWHC 638 (Admin)

Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin)

Secretary of State for Work and Pensions v Information Commissioner EA2006/0040 (5.3.07)

Stewart v Information Commissioner EA/2007/0137 (14.7.08)

Determination

(1) The Tribunal dismisses the appeal and upholds the decision notice dated 15 December 2008 (save that the Appellant may (if so advised) redact certain figures from paragraph 12 of the paper dated 27 April 2006 before disclosing it to the Complainant).

(2) Unless the Appellant commences an appeal against this determination by 13 November 2009 any outstanding information required to be communicated by the Appellant shall be disclosed to the Complainant by 4.00 pm on 16 November 2009; in the event of an appeal, it shall be disclosed forthwith upon the abandonment of the appeal or otherwise when ordered by the appeal court.

Reasons for Determination

Background

1. On 17 May 2006 Barrie Deas, the Chief Executive of the National Federation of Fishermen's Organisations, wrote to the relevant Minister in the Appellant department (DEFRA) expressing concern at a recently announced decision about a limited decommissioning scheme for fishing vessels and requesting sight of the advice on which the decision was based. DEFRA refused his request in reliance on section 35 of the Freedom of Information Act 2000 which provides a qualified exemption for information relating to the formulation of government policy. Mr Deas sought an internal review and DEFRA upheld its previous decision on 31 October 2006.

2. On 10 January 2007 Mr Deas complained to the Information Commissioner under section 50 of the 2000 Act. In due course the requested information was supplied

to the Commissioner by DEFRA. It consisted of a seven page internal departmental advice to the Minister dated 27 April 2006 discussing various schemes to address the issue of matching fishing fleet capacity to available stock levels and it recommended a small decommissioning scheme targeted at the beam trawlers in the Sole Management Area, which was the scheme announced soon afterwards. Paragraph 12 of the advice (which is the only part of it now remaining in issue) read as follows:

> **We have also examined whether it would be possible to purchase the entitlement to quota (FQAs) as well as the licence and vessel under a decommissioning scheme. This might provide a basis for widening the scheme to include beam trawlers in the North Sea including the Anglo-Dutch fleet, which you might otherwise be reluctant to include on the grounds that the wider economic benefit of the grants would leave the UK. Any FQAs purchased might be used to help the under-10 metre and the non-sector fleets. However, purchasing FQAs would be prohibitively expensive; for example, the cost of purchasing the FQA units attached to the Anglo-Dutch vessels registered at Grimsby would range from £… to over £… [our redactions] per vessel. As well as value for money issues, FQA purchase would not be straightforward from a state aid perspective.**

3. By a letter to the Commissioner dated 20 January 2008 DEFRA accepted in effect that the Environmental Information Regulations 2004 rather than the Freedom of Information Act 2000 applied to the requested information since the objective of the decommissioning scheme was "…to reduce the fishing effort on certain fish stock to improve their conservation as part of a wider fisheries management system." The letter also stated that DEFRA considered that the qualified exception at regulation 12(4)(e) ("the request involves the disclosure of internal communications") was engaged.

4. The letter went on to state that DEFRA had reconsidered its position on withholding the advice and they were willing to disclose most of it but that "…certain parts relate to live and continuing policy considerations with respect to fisheries management and conservation…" and that the public interest continued to favour withholding them. Among the parts which DEFRA said should be withheld was paragraph 12; the letter expressly stated that this paragraph considered "…options which may affect our relationship with international institutions…". In relation to other parts to

be withheld, the letter specifically drew attention to a paragraph that discussed the likely impact of any decision on the relationship between representative bodies within the fishing industry and to a whole section which discussed budgetary considerations surrounding the scheme. There was no reference anywhere in the representations made to the Commissioner to legal professional privilege or to regulations 12(5)(b) or (d) of the 2004 Regulations.

5. On 1 April 2009 the Commissioner issued his decision notice. Apart from a category which he described (at paragraph 53) as "…information comprising the opinions of officials on the likely impact of any decision on representative bodies within the fishing industry…" he decided that the public interest favoured disclosure of all the information in the advice. So far as paragraph 12 was concerned, although not expressly referred to in the decision notice, the Commissioner found that regulation 12(5)(a) (adverse effect on international relations) was not engaged and that, although regulation 12(4)(e) was engaged, the public interest in withholding details of policy options discussed but not taken forward did not outweigh the public interest in disclosure (see paragraphs 60-70 of the decision). The Commissioner therefore ruled that paragraph 12 and a number of other parts of the advice which were still being withheld should be disclosed.

The appeal

6. DEFRA appealed against the Commissioner's decision notice on 1 May 2009. The notice of appeal challenged the Commissioner's assessment of the public interest balance in relation to regulation 12(4)(e). It also raised a new exception specifically in relation to paragraph 12 of the advice, namely regulation 12(5)(b), which, subject to the public interest balance, allows a public authority to refuse to disclose information "… to the extent that its disclosure would adversely affect … the course of justice …" which, DEFRA say, includes any information subject to legal professional privilege. In its written submissions dated 24 July 2009 (at paragraph 20) DEFRA also raised regulation 12(5)(d) (which preserves the confidentiality of proceedings of any public authority where such confidentiality is provided by law) which, they say, combined with regulation 12(5)(b), also covers information subject to legal professional privilege.

7. A directions hearing was held on 24 June 2009. DEFRA withdrew its appeal save in relation to paragraph 12 and the parties agreed that the outstanding issues were:

   (1) whether DEFRA were entitled to rely on regulations 12(5)(b) and (d);

   (2) if so, whether paragraph 12 should be disclosed having regard to regulations 12(4)(e) and 12(5)(b) and (d);

   (3) if not, whether it should be disclosed having regard only to regulation 12(4)(e).

   It was also agreed between the parties that those issues should be determined without an oral hearing and provision was made for the service of evidence and submissions with a view to such determination in September 2009.

8. In the event the only evidence placed before the Tribunal was a partly closed statement from Lee McDonough, who has been the Deputy Director of Fishing Industry Management at DEFRA since September 2007. Ms McDonough's statement concentrates almost entirely on the question of legal professional privilege and unfortunately it fails to take account of the well established jurisprudence of the Tribunal that the latest relevant date for considering the applicability of any exemptions under the 2000 Act or the 2004 Regulations, and for considering where the public interest balance lies is the date of the public authority's internal review (31 October 2006 in this case), and that subsequent events are irrelevant for those purposes.[1] Thus, the second part of paragraph 10, paragraphs 11, 18 and 19, much of paragraphs 21 to 23 of the statement and all the exhibits apart from numbers 1, 2, 3 and 10 are irrelevant save in so far as they may throw light back on the situation as it was or was perceived to be in October 2006. And DEFRA's apparent reliance in paragraph 23 of the statement on the fact that the information has already been withheld for a prolonged period is clearly misconceived.

9. We turn to consider the issues set out in the directions.

[1] See for example *DBERR v Information Commissioner* EA/2007/0072 (29.4.08) at paras 104 to 111.

Issue (1): are DEFRA entitled to rely on regulations 12(5)(b) and (d)?

10. It is well established in the jurisprudence of the Tribunal that exemptions under the 2000 Act (or exceptions under the 2004 Regulations) raised for the first time before the Commissioner or the Tribunal should only be entertained if, depending on the circumstances of the particular case, there is a reasonable justification.[2] For obvious reasons it is less likely that an exception will be entertained if it is first raised before the Tribunal. This practice rule is a matter of public policy arising from the underlying purpose of the legislation: if it was not applied, the complaint and appeal process could become cumbersome and uncertain and public authorities could be led to take a cavalier attitude to their obligations under regulation 14 of the 2004 Regulations (and the corresponding provisions of the 2000 Act).

11. DEFRA have submitted in this case (as have other public authorities in other cases) that the Tribunal is in effect obliged to consider any exception raised by it at any stage in the process. We consider that the arguments raised in support of this submission are misconceived in that they fail to take account of the fact that the jurisdiction of the Tribunal (and indeed the Commissioner) is an appellate jurisdiction and that the Tribunal in particular must be able to control and manage its process. But in any event we would not be inclined to depart from the well established rule that we have set out above unless and until it is overturned by a decision of an appellate court.[3]

12. The Tribunal must therefore consider whether in all the circumstances there is a reasonable justification for allowing DEFRA now to rely on the legal professional privilege point and regulations 12(5)(b) and/or (d) although they were not mentioned in the refusal notice or the review decision or before the Commissioner. We are of the firm view that we should not allow these matters to be raised for the first time before us for the following reasons:

[2] See again *DBERR v Information Commissioner* EA/2007/0072 (29.4.08) at paras 41 to 45.
[3] The High Court has recently expressly declined an invitation to decide the issue: see *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin) at para 46.

(1) the relevant period of delay is substantial: two and a half years passed between the review decision and the notice of appeal;

(2) neither DEFRA nor the Commissioner considered them at the time they should have by reference to the relevant existing conditions;

(3) no explanation has been offered for the failure to raise them earlier;

(4) no specific third party interests will be affected (contrast the position in relation to "personal data" and commercially confidential information);

13. In reaching this view we have taken account of the points raised at paragraph 18 of DEFRA's written submissions dated 24 July 2009 on which our comments are as follows:

(1) it is said that the information in paragraph 12 of the advice represents a "very small part of that which was originally requested": we are not sure of the significance of this statement but if it is meant to suggest that the legal professional privilege point could legitimately have been overlooked at an earlier stage we would simply observe that various detailed points were raised as described in paragraph 4 above but there was no mention of legal professional privilege and the only inference we can draw is that the point cannot have been regarded as very important at that stage;

(2) it is said that consideration of the point now will not make it necessary to have a hearing and will cause no prejudice: based on the material which we are now presented with on the legal professional privilege point, we think that the issues merit a full hearing and we would also have wanted to consider joining Mr Deas to the appeal;[4]

[4] In addition to the factual and public policy issues, it is not entirely clear to us as a matter of law at the moment (though DEFRA and the Commissioner apparently agree on the issue) that the exception in regulation 12(5)(b) (which requires that disclosure "…would adversely affect … the course of justice…") applies to all material which is subject to legal professional privilege in the absence of actual or contemplated litigation. Unhelpfully all the cases referred to in DEFRA's submissions on this aspect of the appeal relate to the very differently worded provision in section 42 of the 2000 Act save for *Stewart v Information Commissioner* EA/2007/0137 (14.7.08) in which the information in question had been prepared in contemplation of specific litigation which was the subject of ongoing settlement discussions (see paras 53 to 56). Although there is reference to (though no detail of) judicial review proceedings in Ms McDonough's statement it is clear that such proceedings have arisen recently and there is no evidence about the litigation position in 2006.

(3) it is said that disclosure of the information will cause serious damage as outlined in Mr McDonough's witness statement: as to that, we refer to our remarks at paragraph 8 above and we note that the "serious damage" relied on appears to arise wholly or mainly from matters which have arisen since October 2006.

14. Our conclusions in paragraphs 12 and 13 above mean that issue (2) falls away. We turn to issue (3).

Issue (3): whether paragraph 12 of the advice should be disclosed having regard only to regulation 12(4)(e).

15. It is common ground that regulation 12(4)(e) of the 2004 Regulations applied to paragraph 12 of the advice dated 27 April 2006 as it did to the whole document. It follows that under regulation 12(1)(b) DEFRA was entitled to refuse to disclose it if:

> **…in all the circumstances of the case, the public interest in maintaining the exception [provided by regulation 12(4)(e) outweighed] the public interest in disclosing the information.**

16. The proper approach to these provisions has been considered by the High Court in *Export Credit Guarantee Dept v Friends of the Earth* [2008] EWHC 638 (Admin). We do not propose to set out the relevant passages from that case in detail. The Tribunal has re-read and reminded itself of them (in particular paragraphs 12 to 29 and 38) and has well in mind the earlier Tribunal cases of *DfES v Information Commissioner* EA2006/0006 19.2.07 (particularly paragraph 75 thereof) and *Secretary of State for Work and Pensions v Information Commissioner* EA2006/0040 5.3.07, which were expressly approved by the High Court in the *ECGD* case (see paragraphs 26 to 28). We turn therefore to consider the weight of the competing public interests in this particular case.

17. The general public interest in the disclosure of environmental information (which is reflected in the Regulations and the European Directive which preceded them) was in our view made weightier in this case by the following considerations:

(1) The subject-matter of the advice dated 27 April 2006 plainly related to environmental matters of great importance and legitimate public interest, namely the problem of over-fishing of whitefish and shellfish by the English and Welsh fleets and what could be done about it at that stage and the economic and environmental consequences thereof;

(2) We agree with the Commissioner that there was a strong public interest in the disclosure of *all* the options considered by DEFRA as recorded in the advice, so that the public could see the whole picture including why a particular narrow de-commissioning scheme was adopted and why a possible basis for a widening of the scheme as recorded in paragraph 12 was rejected.

18. On the other hand, the legitimate public interest in maintaining the confidentiality of advice within a government department in the overall interests of good government which is reflected in regulation 12(4)(e) also clearly arose in this case. The following particular considerations are relevant to assessing its weight in relation to paragraph 12 of the advice:

(1) At the time of the request for information the decision to which the advice related had been taken, albeit fairly recently, and the possibility considered at paragraph 12 had clearly been rejected;

(2) Although the option of purchasing FQAs raised by paragraph 12 of the advice would still clearly have been open for consideration at a later date, the circumstances would inevitably be very different when it came to be considered again; in particular, the extent of overcapacity in the fishing fleet, the scope of any decommissioning scheme under consideration and the cost of purchasing FQAs would all be likely to be different;

(3) The proposition at (2) above appears to be accepted by DEFRA (see paragraph 9 of its Reply Submissions dated 18 September 2009) and the department's main concern appears to relate to the effect of disclosure now on litigation which is currently active; but, as we have already recorded in footnote 4 above, the only litigation referred to in evidence clearly arose long

after October 2006 and there is no evidence before us of the litigation situation (whether actual or contemplated) at that date;

(4) We recognize that, regardless of any litigation, the fact that the purchase of FQAs was contemplated and rejected on grounds of cost in the internal advice, might, if it had been disclosed, have had the effect of limiting DEFRA's room for manoeuvre if it wanted to bring an end to FQAs at some later date but:

(a) it would have been clear that any such effect would have substantially diminished by the time any decision was to be made in relation to FQAs (since the circumstances would inevitably be different as we have already said); and

(b) we doubt in any event that it would have come as any surprise to those holding FQAs that they might be able to obtain a price if the department wanted to bring an end to them;[5]

(5) However, (although the point has not been expressly raised by the parties) in our view for obvious reasons the consideration at (4) above would have had particular significance in relation to the actual figures mentioned in paragraph 12 as being the likely cost of purchase of the FQAs attached to particular vessels and we consider that there would have been strong grounds for not disclosing them.

19. We have considered the relative weight of the two public interests in the light of the considerations we identify in paragraphs 17 and 18 above and have come to the firm view that the public interest in the disclosure of paragraph 12 of the advice substantially outweighed that in maintaining the exception in regulation 12(4)(e) save in relation to the actual figures we refer to at paragraph 18(5) above, where the public interest balance was the other way. Subject only to that point, we therefore conclude that the Commissioner's decision that paragraph 12 should be disclosed was correct and that the appeal should be dismissed.

[5] We refer to paragraph 7 of Ms McDonough's statement which states that "…FQAs have come to be considered entitlements by many of those holding them and a thriving market in their sale and lease has developed in the years since 1999". We also note paragraph 12 of open exhibit "LM1" and paragraph 13 of statement (which is closed).

Conclusion

20. Save to the very limited extent we have indicated DEFRA's appeal is dismissed and the Tribunal upholds the decision notice dated 1 April 2009.

21. Our decision is unanimous.

Signed

Murray Shanks
Deputy Chairman

Dated 15 October 2009