



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0119 & 0128

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50413946
Dated: 15 May 2012**

First Appellant: Mrs A V Gross

Second Appellant: Foreign and Commonwealth Office

Respondent: Information Commissioner

Heard at the Central London Civil Justice Centre on 26 November 2012

Date of decision: 4 December 2012

Before
John Angel
(Judge)
and
Michael Jones and Narendra Makanji

Attendances:

For the First Appellant: D T Reading
For the Second Appellant: Richard O'Brien
For the Respondent: no attendance

Subject matter: Section 42(1) Legal Professional Privilege

Cases: *DBERR v O'Brien and Information Commissioner* [2009] EWHC 164 (QB)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 15 May 2012, except in relation to the minute dated 26 August 1999, and dismisses the First Appellant's appeal. In relation to the minute the Tribunal allows the second Appellant's appeal and substitutes a decision notice requiring the disclosure of the minute but with one paragraph redacted.

REASONS FOR DECISION

Background

1. Mrs Gross's partner and representative in this appeal, Mr D T Reading, previously owned shares in a company in Zambia. In 1982 Mr Reading sold his shareholding to his business partner. Mr Reading did not receive full payment and in 1986 obtained judgment against his business partner from the High Court in England. However, Mr Reading has been unable to enforce that judgment in Zambia because he fears that the proceeds might be seized by the Zambian authorities on the grounds that the share sale transaction infringed Zambian exchange control regulations.
2. Mr Reading, having been in correspondence with the Foreign and Commonwealth Office ("FCO") over a number of years in relation to the above matter, requested on 22 June 2005 correspondence exchanged between the FCO and the British High Commission in Lusaka Zambia regarding the legality of the share sale. On 18 July 2005 the FCO confirmed that it held some information within the scope of the request but believed it was exempt from disclosure under section 27(1) FOIA (International Relations) and it needed extra time to consider the public interest test. On 18 August 2005 the FCO disclosed some of the information it held to Mr Reading but withheld other parts under various exemptions under FOIA. Mr Reading complained to the Commissioner about the FCO's handling of this request. The Commissioner issued a Decision Notice on 16 November 2009 (ref FS50184494) in which he found that most of the withheld information was in fact Mr Reading's personal data and that the FCO were exempt from the duty to confirm or deny whether it was held under

section 40(5)(b)(i) FOIA. The Commissioner also found that some of the information (details of corruption cases identified by the British High Commission) was exempt under section 27(1)(a) FOIA. The FCO subsequently provided Mr Reading with copies of the information considered to be his personal data to which he was entitled under the Data Protection Act 1998 (“DPA”).

3. On 6 December 2010 Mrs Gross made the request for information to the FCO with which this appeal is concerned. The terms of that request were as follows:

“I confirm that you have previously supplied my partner Mr D T Reading with a quantity of documents that relate to a share sale he was involved with in Zambia in 1982.

You did however retain a quantity of documents that related to that share sale sighting [sic] exemptions Section 42(1) and Section 35(1)(a). I enclosed a copy of your undated but possibly posted 18 August 2005 letter that confirms the above.

I would now be grateful if you could supply me with those documents that you have previously withheld”.

4. The FCO replied on 30 March 2011. It pointed out that no information was found to have been exempt under section 35(1)(a) FOIA. In relation to information previously withheld under section 42(1) FOIA, the FCO maintained that the exemption still applied. This decision was upheld on internal review on 10 June 2011.
5. On 1 September 2011, Mrs Gross complained to the ICO about the FCO’s withholding of information under section 42(1) FOIA.
6. In his Decision Notice issued on 15 May 2012 (“DN”), and in so far as relevant to this appeal, the Commissioner found that all but one of the documents withheld by the FCO was exempt under section 42(1) FOIA and that the public interest in maintaining that exemption outweighed the public interest in disclosure (§§14-26).

7. The one document to which the Commissioner did not accept section 42(1) FOIA applied was a minute dated 26 August 1999 which was found not to be a communication from or to a legal advisor nor summarised or made reference to legal advice given by a legal advisor (§§20-21 DN). The Commissioner ordered disclosure of this document.

Appeal to the Tribunal

8. On 7 June 2012 Mrs Gross lodged an appeal with the First-tier Tribunal (“FTT”) together with supporting documents against the Commissioner’s finding that the public interest balance favoured withholding the information withheld by the FCO under section 42(1).
9. The FCO lodged an appeal on 19 June 2012 against the Commissioner’s finding that the minute dated 26 August 1999 should be disclosed on the ground that although it was not written by a legal advisor nor to a legal adviser, it explicitly repeats the advice of a legal adviser in one paragraph. As a result it was prepared to disclose the minute minus that paragraph because it was covered by section 42(1).
10. The Commissioner in his response to both appeals accepted the FCO’s appeal and invited the Tribunal to substitute a decision notice accordingly. The minute minus the paragraph was supplied to Mrs Gross by letter dated 23 July 2012.
11. The two appeals were heard together. The Commissioner did not appear and asked the Tribunal to rely on his various written submissions.
12. Mr Reading represented Mrs Gross at the hearing. As set out above he was the real participant in the events which led up to the appeal so was able to give evidence as well as make submissions.
13. At the hearing he raised the matter of what he called the “section 35(1)(a) information” which we deal with below.

The Legal Framework

14. A person requesting information from a public authority has a right to have that information communicated to him, if the public authority holds it: section 1 FOIA. That right is subject to certain exemptions.

15. Section 42 FOIA provides that a public authority may be entitled to refuse to provide information requested on the basis that it is legally privileged:

(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.

16. Where information is within the scope of section 42(1) FOIA, the public authority may refuse to disclose it provided 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) FOIA.

17. The application of the public interest balancing under section 42 FOIA has been explored extensively. In *DBERR v O’Brien and Information Commissioner* [2009] EWHC 164 (QB), the High Court confirmed the approach adopted by a long line of Tribunal authority (from *Bellamy v Information Commissioner and DTI* EA/2005/0023 onwards):

“[39] I have no doubt that the general approach which the Tribunal has adopted to cases under section 42 is entirely correct.

[53] ...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.”

Mrs Gross' grounds of appeal

18. The grounds of appeal are set out at section 6 of Mrs Gross's Notice of Appeal dated 7 June 2012.
19. Mrs Gross does not suggest that the Commissioner was wrong to find that the information withheld from her ("the disputed information") is subject to legal professional privilege ("LPP"), and therefore that section 42(1) FOIA is engaged. However she is not really in a position to be able to challenge whether or not the exemption is engaged because she has not seen the disputed information. We have seen the disputed information and raised questions about it in closed session at the hearing. We conclude that the Commissioner was correct to find that the exemption is engaged.
20. Mrs Gross then very properly goes on to consider the public interest test. Mrs Gross does not appear to dispute that there is an inherent strong public interest in maintaining the exemption. However, Mrs Gross claims that the Commissioner placed insufficient weight on the public interest in disclosure in this case.

The public interest test

21. There is much case law which establishes that we should be considering the public interest balance in relation to factors existing at the time of the request or thereabouts.
22. Mr Reading provided us in evidence with comprehensive correspondence going back to 1986 relating to why he considers he has been prevented from receiving the balance of consideration from his share sale. He makes some serious allegations. Firstly that a Mr X who in 1986 was the Director of the Special Investigation Team (Economy and Trade) for the Government of the Republic of Zambia provided false information to a UK court about exchange control regulations. That the Anti-Corruption Commission of Zambia ("ACC") which has been in receipt of considerable aid from the UK refused to deal with a complaint made by him and that there was collusion between the ACC and the British High

Commission. He also raises general concerns in relation to alleged misspending of UK foreign aid in particular because he says the UK provided Mr X with a salary supplement. He asserts that the public have a right to know how recipients of UK Aid funding are conducting themselves.

23. Mr Reading argued before us, supporting Mrs Gross' grounds of appeal, that there are five principal factors which he submits are weighty public interest factors in favour of disclosure.

24. Firstly, Mr Reading, argues there is a public interest in knowing whether a Zambian civil servant, who received a salary supplement from the UK as Aid funding, committed perjury in a British court. The circumstances were that in litigation in the High Court in England where Mr Reading was suing a former business partner for non payment of part of the consideration for the sale of shares in a company, Mr X provided an affidavit to the court dated 11th July 1986 in which, Mr Reading considers, false information was provided. In his view the UK Government had both a legal and moral responsibility for Mr X's actions.

25. It is not clear to us whether the information provided by Mr X was true or false. This is not a matter, however, that we need to or are in a position to decide in this case.

26. Mr O'Brien for the FCO says this is not a public interest factor we should take into account or if we do should give little weight to it because:

(1) Even if there was perjury this was by a foreign civil servant not someone working for the FCO or UK Government. In any case Mr X may have made a mistake or even correctly stated what he considered were the exchange control regulations at the time of the sale of shares back in the early 1980s;

(2) The fact that the UK Government may have subsidised Mr X's salary, among many other Zambian civil servants, did not mean that the Government controlled his activities either legally or morally and therefore cannot be responsible for them;

- (3) In any case it relates to an action which took place in 1986, over 25 years ago, in relation to a private matter;
- (4) Although Mr Reading said that he thought that the subsidy was as much as £20,000 per annum and was paid directly into Mr X's bank account by the UK Government no documentary evidence was provided to substantiate this.

27. The Tribunal having considered the evidence and arguments agree with Mr O'Brien that we can give little weight to this public interest factor, if it is one. There is no evidence that Mr X's work was controlled by the UK government and the relationship was too remote for there to be any moral responsibility which would amount to a general public interest in favour of disclosure.

28. Secondly, Mr Reading argues that there is a public interest in knowing how effectively overseas aid payments are being used. If they are being used for, in effect, illegal activities, then there is a public interest in knowing this. He provided us with a copy of the Zambian Government's January 1992 Budget address which seems to recognise that there were some irregularities in the way foreign currency transactions took place.

29. Mr O'Brien argues that Mr Reading cannot base such an argument on the experience of only one individual over one transaction. Although Mr Reading gave us another example he provided no documentary evidence of this other matter. In any case this all happened 25 years ago and there is no evidence that at the time of the request such matters were still happening.

30. Again we find it difficult to accept this is a public interest we can give much weight to. In this case the length of time since the event means, in our view, that any strength in the public interest would have diminished by the time of the request. Also there is no concrete evidence that the irregularities referred relate to his case.

31. Thirdly, Mr Reading argues that there is a public interest in knowing whether the FCO were concealing evidence that he needed permission from the Zambian authorities to undertake his sale of shares.

32. Mr O'Brien says there is no documentary evidence showing this. In fact, he says, the evidence shows that the FCO was doing its best to help Mr Reading and there is no evidence that the FCO were hiding anything or of any wrongdoing. Mr Reading accepts that this was correct until 1998 while Roger Clark of the British High Commission in Lusaka was involved. However the FCO were less helpful afterwards.
33. We note that the FCO's change of approach was only after Mr Reading involved his MP which seems to have formalised communications. However we find that the evidence in this case does not give rise to a public interest factor to which we can give much weight.
34. Fourthly, Mr Reading says there is a public interest in showing how the FCO supports UK nationals abroad. Mr O'Brien says the evidence shows that they tried to help him.
35. Again we find, based on the evidence before us, that not much weight can be given to this public interest factor.
36. Finally, Mr Reading says there was collusion between the British High Commission in Lusaka and the ACC to deprive him of the right to enforce his rights in Zambia and that there is a public interest in knowing what went on. He makes this allegation because of the way correspondence was passed between them.
37. Mr O'Brien argues that the communications referred to by Mr Reading do not prove collusion but rather show that the High Commission and ACC were trying to be helpful to Mr Reading.
38. From the evidence we find that we cannot give much weight to this public interest factor.

The Commissioner's Response to Mrs Gross' appeal

39. The Commissioner relied primarily upon his DN in opposing the first appeal. He submitted that Mrs Gross's grounds of appeal did not identify any error of law or fact in the DN, or any incorrect use of the Commissioner's discretion.
40. The Commissioner's consideration of the public interest test is set out at §§22-26 DN.
41. The Commissioner noted that there was a very strong inherent public interest in maintaining section 42 FOIA, noting the decisions of the Tribunal in *Bellamy* and the High Court in *DBERR* (§§22-23 DN).
42. The Commissioner recognised that there was "a general public interest in favour of disclosure in terms of improving the openness and transparency of the FCO". The Commissioner also recognised that there was a specific public interest in disclosure in this case "in understanding more about how the FCO reacted in a situation where a British national was facing a difficult situation overseas" although he did not consider this factor to be of significant weight (§24 DN).
43. However the Commissioner points out that the public interest test under FOIA is concerned only with public interests, not private interests (see §61 of *Hogan and Oxford City Council v Information Commissioner* ([2011] 588 1 Info LR)). Mrs Gross's (or Mr Reading's) private interests are not in themselves relevant to the public interest test. For example, a requester may have a grievance they are pursuing and may think the information they want will help them. This in itself is not a relevant factor. There would only be a public interest argument if it could be shown that there is a wider public interest that would be served by disclosing that information.
44. In this case, the Commissioner noted that disclosure of the withheld information "would likely be of great and undoubtedly justified import" to Mrs Gross and Mr Reading, however he was not satisfied that this was relevant to the *public* interest in disclosure (§25 DN).

45. In relation to the public interest factors raised by Mrs Gross in her grounds of appeal the Commissioner submits that, whilst of general importance and obvious personal interest to Mrs Gross, none of these issues are relevant to the *public* interest in disclosing the disputed information. Furthermore, the Commissioner submits that, having regard to the specific content of the disputed information in this case, disclosure would not in any event assist or shed light on the these issues raised by the factors.

Public interest balance

46. We find that the public interest factors in favour of disclosure, including that of transparency and openness, cannot be given much weight in the circumstances of this case for the reasons given above and that the public interest in maintaining the exemption, which is inherently very strong, outweighs the public interest in disclosure .

47. For Mr Readings benefit we find that, having carefully considered the disputed information, there appears to be nothing there that shows any wrongdoing by the FCO, rather the reverse.

48. Clearly Mrs Gross (and Mr Reading) has a very strong private interest in relation to the outstanding share sale consideration but these are not matters we can take into account under FOIA.

Other information

49. Mr Reading considers that there is still other information the subject of the request which the FCO has not provided to the Tribunal. This is what we have described above as the section 35(1)(a) information. The DN seems a little confusing in this regard and we can understand why Mr Reading has raised the matter.

50. Mr O'Brien says the explanation is simple. At the time of the request there was no other information. Section 35(1)(a) may have been applied to the some or all

of the disputed information in the course of dealing with the previous requests and possibly this request, but the FCO were now only relying on section 42(1).

51. Mr Reading has provided no evidence to show there is any other information and in the absence of such evidence we accept the explanation of the FCO and on the balance of probabilities we find there is no other information which we need to consider in this case.

Conclusion

52. We uphold the Commissioner's DN as far as Mrs Gross' appeal is concerned and dismiss this appeal. With respect to the FCO's appeal, and by consent of the Commissioner, we substitute that part of the DN so that the FCO only has to disclose the minute minus the paragraph to which s.42(1) applies. We understand the redacted minute has already been disclosed to Mrs Gross.

53. Our decision is unanimous.

[Signed on the original]

Professor John Angel
Judge

4 December 2012

Paragraphs 12 and 28 and details on page one amended on 5 December 2012 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009