Appeal number: EA/2018/0205

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

EDWARD WILLIAMS **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondents**
MINISTRY OF JUSTICE

TRIBUNAL: JUDGE ALISON MCKENNA
Mr DAVE SIVERS
Mr STEPHEN SHAW

Determined on the papers, the Tribunal sitting in Chambers on 1 August 2019

OPEN DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellant made an information request to the Ministry of Justice ("MOJ") on 31 March 2018 in the following terms:

> *"I would like to see the legal advice, and all other information, relating to the Sec. of State for Justice not issuing, or being a party to, judicial review proceedings with regard to the decision of the Parole Board with regard to JOHN RADFORD (formerly known as JOHN WORBOYS) …. I also want to see how much the advice cost the state. Please supply copies of all invoices etc. and a breakdown of costs…."*

3. MOJ initially refused the information request in reliance upon s. 42 (1) of the Freedom of Information Act 2000 (legal professional privilege). Its initial view was upheld on internal review on 26 July 2018.

4. MOJ subsequently provided the requested information about the costs of the legal advice. The Appellant complained to the Information Commissioner only about MOJ's refusal to provide the remainder of the requested information[1].

5. The Information Commissioner issued a Decision Notice 19 September 2018, upholding MOJ's decision and requiring no steps to be taken. The Decision Notice considered the nature of the s. 42 (1) exemption, noting that it is class-based, so that the requested information only has to fall within the class of information described by the exemption for it to be exempt[2]. The Decision Notice further considered the sub-category of legal privilege applicable to the requested information and identified it as falling within the sub-category of "litigation privilege" because the requested advice was taken to assist with anticipated litigation and to determine whether such litigation might be successful.[3] She concluded at paragraph 29 of the Decision Notice that the exemption under s. 42(1) FOIA was engaged in this case.

6. The Information Commissioner's Decision Notice went on to conduct the public interest balancing exercise required by s. 2 (2) (b) FOIA. At paragraphs 40 to 50, she weighed the arguments in favour of and against the disclosure of the requested information in the public interest. She accepted that there is a public interest in transparency both in general and in relation to this particular case, but also considered

[1] DN paragraph 18

[2] DN paragraph 21

[3] DN paragraph 26

the considerable amount of material already in the public domain as a result of a legal judgment and a Ministerial statement. She considered whether the disclosure of the requested information would add materially to the sum of public knowledge. The Information Commissioner also considered the importance to the justice system of the principle of legal professional privilege and the public interest which lies in maintaining the right of parties to communicate with their legal advisers in confidence. At paragraph 51 of the Decision Notice, the Information Commissioner concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Appeal to the Tribunal

7. The Appellant appealed to the Tribunal. His Notice of Appeal dated 19 September 2019 accepted that the legal advice was subject to legal professional privilege but relied on grounds that the Decision Notice was wrong in law because there was a prevailing public interest in disclosure. He submitted that the Information Commissioner had adopted "the wrong starting point" in considering legal professional privilege because she should have taken the view that there must be disclosure unless MOJ can demonstrate that it would suffer prejudice through disclosure. He submitted that, if Parliament had wanted to make legal professional privilege an absolute exemption under FOIA it could have done, but it had not. Accordingly, s. 42 (1) FOIA should not in his submission be regarded as having a "built-in" public interest against disclosure.

8. The Information Commissioner's Response dated 10 October 2018 maintained the analysis as set out in the Decision Notice. It was noted that the Appellant had not disputed the engagement of s. 42(1) FOIA but had challenged only the Commissioner's application of the balance of public interest test. To the extent that the Appellant had suggested that the Secretary of State had as a matter of law waived legal professional privilege by making a statement to Parliament, this was denied. It was also denied that the information requested was stale, because the proceedings to which the requested advice related were said to be incomplete.

9. At paragraph 39 of the Response, the Information Commissioner referred to the public interest in protecting the principle of legal professional privilege. It was accepted that there is no inherent public interest in s. 42(1) but submitted that the importance of protecting the principle of legal professional privilege must be considered. The legal authorities relied on in support of that submission are considered further below.

10. In the Appellant's Reply to the Information Commissioner dated 11 October 2018, he emphasised that he did not accept the argument that there had been no waiver or indeed that the Worboys case was still "live".

11. The MOJ's Response dated 13 November 2018 generally supported the Information Commissioner's Decision Notice. It set out the MOJ's understanding of the legal framework at paragraphs 18 to 22, and explained why it did not regard the Ministerial statement as waiving privilege at paragraph 24. With reference to case

law, this was said to be because the Minister had not revealed the contents of the advice itself but only referred to its existence and his decision.

12. MOJ explained why it regarded the issues relevant to the information request as still live at paragraph 31 (iv) of its Response. This was because, although the Judicial Review had concluded, Mr Worboys was still awaiting his fresh hearing by the Parole Board and the Government had not yet published its response to the consultation about reconsideration of Parole Board decisions.

13. MOJ explained its approach to the public interest balance at paragraphs 26 to 32 of its Response. The legal authorities relied on are referred to below. It is submitted that the public interest in maintaining the rule of law, of which legal professional privilege forms a part, has been acknowledged in numerous decisions of the Upper Tribunal and Higher Courts, whereas the Appellant's approach to that issue is unsupported by legal authority and "profoundly misplaced". It is submitted that the factors relied on by the Appellant in support of disclosure do not individually or cumulatively outweigh the pubic interest in maintaining the exception. Further, MOJ submits that the significant amount of information already in the public domain about the Worboys case serves to reduce the public interest in disclosure of the requested information.

14. In his Reply dated 14 November 2018 and in his Final Submissions, the Appellant emphasises that s. 42(1) is not an absolute exemption and raises a new argument about there being a public interest in being able to decide whether the public money spent on the advice represented value for money. He also submits that there is a public interest in knowing why MOJ and the Parole Board did not share a lawyer to save money. We note that he refers to the "obscene" cost of the entire proceedings when making these arguments, rather than the cost of the particular advice with which we are concerned.

15. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising some 230 pages, including submissions made by all parties, for which we were grateful. We also considered a closed bundle containing material within the scope of the request. We refer to this material in the closed annexe to this Decision.

The Law

16. Section 42 (1) FOIA[4] provides that:

42 Legal professional privilege.

[4] http://www.legislation.gov.uk/ukpga/2000/36/section/42

(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.

17. Section 42 (1) falls into the class of exemptions to which s. 2(2) (b) FOIA[5] applies, as follows:

(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.

18. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA[6], as follows:

"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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

19. As the parties have referred in submissions to Decisions of differently-constituted panels of the First-tier Tribunal, and as the Appellant has expressed his disagreement with a Decision of the Upper Tribunal, it may assist if we explain here that we are bound by the Decisions of the Upper Tribunal and Higher Courts as a matter of legal precedent. We are not so bound by Decisions of the First-tier

[5] http://www.legislation.gov.uk/ukpga/2000/36/section/2

[6] http://www.legislation.gov.uk/ukpga/2000/36/section/58

Tribunal, which each turn on their own facts. The Higher Courts may of course approve the First-tier Tribunal's Decisions, but this does not give them precedent value in their own right. See *O'Hanlon v IC* [2019] UKUT 34 (AAC)[7].

20. On the question of waiver, we have considered the Upper Tribunal's Decision in *GW v The Information Commissioner, The Local Government Ombudsman and Sandwell Metropolitan Borough Council* [2014] UKUT 0130[8], in which Judge Turnbull considered whether legal professional privilege had been waived in different circumstances. He decided that the communication alleged to have waived privilege in that case had done "…*no more than to summarise the effect of the Advice. They did not cross the line into setting out or summarising the contents of all or part of the Advice"* and he accordingly found that privilege had not been waived.

21. We note that considerable weight is to be afforded to a decision of a Three Judge Panel of the Upper Tribunal[9]. In *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC)[10], a Three-Judge Panel of the Upper Tribunal chaired by the then-Senior President of Tribunals, underlined the importance of the system of legal professional privilege to a fair and proper judicial process. The Upper Tribunal considered in *DCLG* that weight should be attributed not only to the need to maintain legal professional privilege in that case but also to the more generalised risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of the system of legal professional privilege.

22. We were referred to the Upper Tribunal's Decision in *Savic v IC, AGO and CO* [2016] UKUT 534 (AAC)[11], in which the Upper Tribunal concluded at paragraph 35 that:

> "…*if the information sought under FOIA is relevant to, or might be or might have been of use in, existing, concluded or contemplated legal proceedings this adds to the weight of the factors against disclosure because, although FOIA is applicant and motive blind, the disclosure would effectively deny the public authority to whom the FOIA request is directed its right as a litigant in proceedings to refuse disclosure and so cause damage to the manner in which*

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[7] https://assets.publishing.service.gov.uk/media/5c7fb354e5274a3f8edc00cf/GIA_1680_2018-00.pdf

[8] https://www.bailii.org/uk/cases/UKUT/AAC/2014/130.html

[9] *Dorset Healthcare NHS Trust v MH* [2009] UKUT 4 (AAC) at paragraphs 36 and 37, http://administrativeappeals.decisions.tribunals.gov.uk//Aspx/view.aspx?id=2607

[10] http://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3477

[11] https://www.gov.uk/administrative-appeals-tribunal-decisions/savic-v-the-information-commissioner-and-others-2016-ukut-0534-aac

proceedings are, have been or might be conducted, and thus to the administration of justice".

23. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Conclusion

24. Firstly, it is not in dispute that s. 42 (1) FOIA is engaged by the material within the scope of the request and we find accordingly.

25. On the question of whether the Ministerial Statement waived the legal professional privilege originally attached to the legal advice, this is a question of fact to be determined on the evidence before us. We have read the advice and we have read the Ministerial Statement. Having regard to the appropriate legal test, we conclude that the Statement referred to the existence of the legal advice but did not disclose its contents. We are not persuaded that the Minister waived legal professional privilege in making the Statement.

26. In approaching the public interest balancing exercise, we conclude that the matters to which the withheld information relate were "live" as at the relevant time for making that assessment, which was the date of MOJ's internal review in July 2018. We are not persuaded by the Appellant's submissions that the issues were by then stale or that events subsequent to the MOJ's internal review should influence our evaluation of that issue. We accept that, at the relevant time, matters relating to the Worboys case were on-going both in terms of the review of public policy matters which the case generated and also in terms of Mr Worboys' own on-going legal proceedings. We conclude that its continuing currency added an element of sensitivity to the disclosure of the requested advice which might not have been present if more time had been allowed to pass before the information request was made.

27. We have also taken into account the fact that a considerable amount of information about the Worboys case was already in the public domain by the time of MOJ's internal review. We have considered the public interest in disclosure of the particular additional information requested in this context. We have considered the value of legal advice given prior to legal proceedings in which a public judgment has since been given. We are not persuaded that there is a high level of public utility in the particular information requested when taking all these factors into account.

28. We agree with the Appellant's submission that s. 42 (1) FOIA has no in-built bias against disclosure. However, we must apply the public interest test to the facts of this case, taking into account (as required by the Decisions of the Higher Courts) that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets. It is clear from the Upper Tribunal's Decision in *Savic* that the factors pointing against disclosure in information requests

for information attracting legal professional privilege pertain after the conclusion of legal proceedings as they do during those proceedings.

29. We weigh those factors against the public interest in transparency generally and the particular interest in transparency in this high-profile and concerning case.

30. Having weighed all these factors, we conclude that the public interest favours maintenance of the exemption in this case. The Appellant has not persuaded us that the factors in favour of disclosure outweigh the factors in favour of maintaining the exemption.

31. For the above reasons, we find no error of law in the Decision Notice and this appeal is dismissed.

(Signed)

ALISON MCKENNA **DATE: 12 August 2019**

CHAMBER PRESIDENT **Promulgation date 14th August 2019**