First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0275V

Before
Judge Stephen Cragg Q.C.

Heard via the Cloud Video Platform on 23 September 2020

Between

Crown Prosecution Service

Appellant

and

The Information Commissioner
Prof Robin Callender Smith

Respondents

The Appellant was represented by Adam Heppinstall

The Commissioner was represented by Will Perry

Prof Callender Smith represented himself

DECISION AND REASONS

DECISION

1. The appeal is allowed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.

4. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 105, together with additional open documents and a closed bundle.

BACKGROUND

5. On 12 October 2018 Professor Callender Smith wrote to the Crown Prosecution Service (the CPS) and requested information as follows: -

> "This FOIA request is for the legal grounds - redacting any personal or sensitive personal data - contained within any Treasury Counsel's Opinion on the discontinuance of the trial of Paul Burrell at the Central Criminal Court in 2002."

6. Paul Burrell was a butler to Princess Diana. After her death, he was found to have some of her possessions and was charged with theft. Information emanating from the Queen during the trial in 2002 indicated that Mr Burrell had informed the Queen that he had some of the possessions. The prosecution considered the disclosure of this information to the defence and the consequential possibility that further enquiries might need to be made of the Queen, including a possible request for her to give evidence. Advice on the compellability of the monarch to give evidence in criminal

proceedings was sought and provide on 31 October 2002, and the prosecution discontinued shortly thereafter.

7. On 2 November 2018 Prof Callender Smith clarified his request saying: -

> "The narrow issue of interest in this FOIA request - and this may be reflected in both Treasury Counsel's Opinion as well as the advice given on discontinuance - is the law relating to the competence and, as a separate matter, the compellability of the Sovereign (in this case The Queen) to give evidence at the trial. The leading case on this issue - which may or may not have been considered in the Opinion and/or advice on discontinuance, is *R v Mylius* (1911). This issue, which arose during the course of the case, may not have been part of Treasury Counsel's original opinion. It is likely, however to have been part of the advice given on discontinuance."

8. On 12 November 2018 the CPS responded to explain that it was withholding the information, which it held, on the basis of the exemption in section 42(1) FOIA, which relates to legal professional privilege (LPP). There was an internal review which upheld the decision on 20 November 2018. Prof Callender Smith contacted the Commissioner on 20 November 2018 about the way his request for information had been handled.

THE LAW AND THE COMMISSIONER'S DECISION

9. Section 42 FOIA states that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt information. Section 42(1)(a) FOIA reads, materially, as follows: -

> **42.— Legal professional privilege.**
> (1) Information in respect of which a claim to legal professional privilege… could be maintained in legal proceedings is exempt information.

10. In this case it is not in dispute that s42 FOIA applies to the requested information. The Commissioner deals with the issue in the decision notice as follows: -

> 18. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It covers communications between lawyers and third parties, as long as they are made for the purposes of the litigation. Litigation privilege applies to a wide variety of information, including advice, correspondence, notes, evidence or reports.
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> ...
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> 21. The CPS explained that the withheld information was provided for the purposes of litigation, including communications with third parties, as the dominant purpose of the communication was to assist in the preparation of litigation.
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> 22. The Commissioner has reviewed the withheld information which is a legal note about the competency and compellability of the Sovereign to be called as a witness in court proceedings. She is satisfied that the information is held for the dominant purpose of assisting in proposed litigation and therefore attracts legal professional privilege.
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> 23. Taking everything into account, the Commissioner considers that section 42(1) is engaged.

11. However, this is a qualified exemption which means that in addition to demonstrating that the requested information falls within the definition of the exemption, there must be consideration of the public interest arguments for and against disclosure to demonstrate in a given case that the public interest rests in maintaining the exemption or disclosing the information. When applying the public interest test the approach to be taken is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: s2(2)(b) FOIA.

12. In relation to the application of the public interest test in s42 FOIA cases, in *DBERR v O'Brien v IC* [2009] EWHC 164 QB, Wyn Williams J gave the following important guidance:

> 41. … it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

> 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.

13. Further, in *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted as follows in emphasising that the s42 exemption is not a blanket exemption: -

> 68. The powerful public interest against disclosure … is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply.

However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute.

14. The Tribunal was also referred to the case of *Breeze v Information Commissioner and CPS* EA/2013/52 & 153 which, although it is a FTT case, rehearses some of the previous case law: -

> 50. It is well established that the public interest in withholding information covered by legal professional privilege is significant. The Upper Tribunal in *DCLG v IC and Robinson* [2012] UKUT 103 (AAC) [2012] 2 Info LR 43 considered the development of the doctrine of legal advice privilege, and the public interest rationale for protecting the confidentiality of legal advice:
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> > 37. The development of the doctrine of legal advice privilege, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court, Ex parte B*, [1996] AC 487, and then summarised by him as follows at 507D:
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> > > "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

15. The Commissioner's decision notice is dated 4 July 2019. Towards the beginning of the determination the Commissioner records that: -

> 13. During the Commissioner's investigation, the CPS confirmed that the legal advice, in this case a legal note, is 17 years old. The Commissioner also asked the CPS whether the advice was still current or if there had been any more recent legal advice on this

topic. The CPS explained that it considered that the advice was still current.

16. The Commissioner considered the public interest balance in the decision notice. Effectively, the CPS had emphasized the in-built public interest in non-disclosure once it is accepted that LPP attaches to the document. The Commissioner mentions the following factors as part of the in-built public interest in non-disclosure (paragraphs 25-30): -

    (a) LPP was developed to ensure that a client is guaranteed the greatest level of openness to allow for full and frank legal advice from their legal advisors in confidence.

    (b) It is important for public authorities to be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them, without the fear of intrusion.

    (c) Both client and legal adviser need to be able to discuss and debate any investigation or prosecution freely to ensure that they have considered the issues fully.

    (d) It is vital for the effective conduct of the prosecution process that confidential communications between the CPS and third parties can take place. The CPS argued that the prosecution process would be severely prejudiced if such communications were hindered by the fear of subsequent disclosure.

    (e) It is important for the effective conduct of the prosecution process that CPS lawyers are able to give and receive high quality comprehensive advice to/from counsel.

    (f) Disclosure of legal advice would present a significant prejudice to its ability to defend the legal interest of the CPS and carry out its public function as the principal prosecuting authority for England and Wales

(g) There is a strong public interest in maintaining the section 42(1) exemption in this case as the content of the advice note is still considered current.

17. The Commissioner referred to the following public interest factors in favour of disclosure (paragraphs 31-34): -

(a) There is public interest in public authorities being accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability.

(b) Transparency in the decision-making process and access to the information upon which decisions have been made can enhance accountability.

(c) There is public interest in knowing whether or not legal advice has been followed in some cases.

(d) The fact that public funds had been spent on the legal advice added weight to the public interest arguments based on transparency.

18. The Commissioner concluded that the public interest reasons did not need to be 'exceptional' to overturn the strong public interest in maintaining the exemption, but she recognised the significant public interest in not undermining the ability of a public authority to freely seek and receive frank legal advice in future, and the need for confidentiality between lawyers and their clients so that advice can be given freely without fear of intrusion. She accepted that the CPS had the right to seek legal advice as to what 'the CPS can and cannot compel the Sovereign to do in terms of calling her as a witness in court proceedings' (paragraph 39) and the important fact that the legal note is still current.

19. However, the Commissioner noted that the legal note was 17 years old, is of a general nature, and does not make any direct reference to the court proceedings mentioned in the request. The Commissioner referred to the

expectation that the CPS will be transparent about its approach to criminal proceedings. She also said this: -

> 42. The Commissioner also gives weight to the fact that the CPS is the public authority entrusted with the prosecution of criminal offences. She considers that there is a strong public interest in understanding the advice which the CPS received in relation to compelling the Sovereign to appear as a witness in criminal proceedings which is still considered current. The Commissioner is not aware that the CPS has published a policy or any guidance on this issue.
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> …
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> 44. The Commissioner also notes that the request is asking for information about the competency and compellability of the Sovereign to give evidence in court proceedings as opposed to asking for information about the Queen as an individual. The Commissioner considers that there is a strong public interest in this issue.

20. The Commissioner decided that there was 'a stronger public interest in the public knowing about the competency and compellability regarding whether the Sovereign can be called as a witness in court proceedings. (paragraph 45), then the public interest in withholding the information.

THE APPEAL AND RESPONSES

21. The CPS filed an appeal dated 1 August 2019 which argued that the Commissioner had failed to strike the public interest balance correctly. It was submitted that the Commissioner should have taken into account additional particular circumstances of the giving of advice by treasury counsel to the Crown, in connection with the halting of a criminal prosecution, and the special importance of the 'crucial role' of the prosecuting advocate in the criminal justice system.

22. It was argued that the advice note was not general as it was obtained specifically in relation to the case referred to in the request, and that the age of the advice was not a relevant circumstance. The CPS argued that Halsbury's Laws of England set out the legal position on the specific question on the compellability of the Sovereign, and so the public interest in the advice received by the CPS is lessened as a result. It is said that the withheld information 'does not advance the learning of the law' beyond what can be gleaned from the textbooks, and that the issue about the compellability of the Sovereign is very rarely raised in any event.

23. The CPS also claimed the protection of another qualified exemption, under Section 30(1) FOIA, which states materially: -

> (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-
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> …
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> (c) any criminal proceedings which the authority has power to conduct.

24. In relation to the s42 FOIA exemption, the CPS cited case law which indicates a strong public interest in the CPS being able to conduct prosecutions safe in the knowledge that information would not subsequently be disclosed outside of the trial context: *Breeze v IC and CPS* EA/2013/52 & 153 (see above at paragraph 14).

25. The Commissioner's response emphasized and supported the contents of the decision notice.

26. Prof Callender Smith pointed out that the entries in Halsbury's Laws of England do not refer to the right to a fair trial set out in Article 6 of the European Convention on Human Rights, and he also set out some examples which suggested that the possibility of the Sovereign giving evidence in a criminal trial might be more likely than the CPS had submitted.

EVIDENCE AND THE HEARING

27. The hearing was conducted remotely, but both the CPS and the Commissioner were represented, and Prof Callender Smith also attended.

28. The Tribunal heard evidence from one witness. Mr Gregor McGill is the director of legal services at the CPS and has provided a signed statement which he says should be dated 13 July 2020. This sets out the background to the case. He emphasized the importance of LPP in criminal cases and the need for prosecuting advocates to discharge their duties fearlessly and candidly 'as a cornerstone of an open and fair criminal justice system' and as elucidated in the Farquharson Guidelines (on the role and responsibilities of the prosecution advocate) which were exhibited to his witness statement. He referred to what he perceives to be a 'chilling effect' of releasing advice given for the purpose of litigation. In his witness statement he questioned the public interest in disclosure and says that anyone with an interest in the issue in question in this case can make 'academic enquiries' or obtain their own legal advice on the issue.

29. Mr McGill also gave evidence in open session in the case which supported the contents of his witness statement. He confirmed that the advice in question was, in fact, from senior treasury counsel and had been requested by the then Director of Public Prosecutions (DPP). This detail had previously been redacted from the documentation and so the information was opened to Prof Callender Smith, together with the CPS concern, expressed in the redacted part of paragraph 2 of the CPS skeleton argument that 'at the heart of this appeal' was the question 'if Senior Treasury Counsel's Advice on a matter such as the present cannot be kept out of the public domain – what hope is there for a Prosecuting

Advocate's Advice in a 'run of the mill' prosecution in a local crown court?'.

30. Mr McGill confirmed that transparency was important for the CPS and there were occasions when the CPS, of its own volition, would disclose a prosecuting advocate's advice in situations such as public inquiries or private law actions, where it decided it was right to do so. He confirmed that the advice in this case still represented the CPS view of the law. He was concerned that disclosure of the advice would set a precedent and cause a chilling effect for other prosecuting advocates giving advice, especially as this was advice sought by the DPP from senior treasury counsel on a significant issue, although he accepted that disclosure under FOIA would depend on the facts of each case. He accepted that in this case the advice was purely on a point of law but was only of esoteric interest, in his view.

31. There was a need for a frank discussion between the CPS and prosecuting advocates, and a need for prosecuting advocates, on occasions, to provide unpopular advice (for example, against prosecution contrary to what he called the 'public mood'). Concerns about possible disclosure could lead to the interference with proper justice, and there was a concern if even one miscarriage of justice might be caused as a result of a prosecuting advocate not providing candid advice because of fear of disclosure. However, Mr McGill accepted that prosecuting advocates providing advice would continue in general to provide robust advice whether or not disclosure happened in this case.

SUBMISSIONS AND DISCUSSION

32. Mr Heppinstall for the CPS emphasized the test set out in paragraph 53 of the *DBERR* case (see paragraph 12 above) and supported the evidence of Mr McGill.

33. Mr Perry, for the Commissioner, emphasized the main public interest arguments relied upon by the Commissioner in the decision notice (see paragraph 16 above). These can be summarized as relating to accountability and transparency in decision making, especially where the advice in question has been obtained with public funds. Mr Perry augmented these reasons on behalf of the Commissioner by referring to the constitutional importance of the issue, the passage of time since the advice was provided, the fact that the advice provides something akin to the CPS policy on the issue in question, and that no prejudice, in his submission, would be caused by disclosure.

34. Mr Perry accepted the formulation of the test to be applied in s42 FOIA cases, as set out in the *DBERR* case, but also argued that the 'in-built' significant weight to be given to LPP could change depending on the particular circumstances in which the advice was given.

35. However, in my view there is nothing in the case law to which I have been taken which indicates that the 'in-built' significant weight can vary from case to case. The approach I have to take is to recognize that there is a significant in-built public interest in non-disclosure in LPP cases under s42 FOIA, as the court said in *DBERR* paragraph 53, 'in any event'. As the court indicated in paragraph 51 of that case it is 'not necessary to demonstrate any specific prejudice or harm from the specific disclosure of the documents in question'.

36. It is then necessary to assess whether there are other factors to be taken into account which support non-disclosure, and then

consider whether the public interest in disclosure is equal to or outweighs those combined factors.

37. In relation to other factors which support non-disclosure, it seems to me that the CPS has overegged its position in this appeal. It is argued that extra weight should be given to the public interest in non-disclosure because this was advice sought by the DPP from senior treasury counsel. It is also argued that the particular nature of advice from prosecuting advocates in criminal proceedings should provide additional weight.

38. These factors may be worthy of a degree of additional weight, but the answer to the CPS question in its skeleton argument, set out above ('what hope is there for a Prosecuting Advocate's Advice in a 'run of the mill' prosecution in a local crown court' if this advice from senior treasury counsel cannot be kept out of the public domain) is, in my view, straightforward. Each case has to be considered on its own merits where a request for disclosure is made, and the public interest for and against disclosure also considered in each case. As in this case, those issues can then be considered by the Commissioner and this Tribunal, and no absolute guarantee can be given to any prosecuting advocate that the public interest would not lead to disclosure. The fact that there may be particular factors in a case which leads to disclosure under FOIA does not undermine the principle of LPP in other cases where different factors may be important.

39. As well as possible disclosure under FOIA Mr McGill explained, there are times when the CPS discloses advice from prosecuting advocates in the context of civil litigation or a public inquiry. Prosecuting advocates, therefore, are also at risk that advice from a particular case might be disclosed by the CPS for those purposes. An example in the case of *Mouncher v South Wales Police* [2016] EWHC

1367 (QB) was given by Mr McGill, and it can be seen in section 4 of the long judgment in that case that extensive reference is made to prosecuting counsel's written advice as well as advice provided in face to face meetings with the CPS. This example was presented to illustrate that the CPS does not advocate a blanket ban on disclosure of advice from prosecuting counsel, but it also illustrates that prosecuting advocates will be aware that there are indeed other occasions apart from the FOIA scheme where the contents of advice might be disclosed.

40. In my view if the advice in this particular case were disclosed it would have very little or no chilling effect on prosecuting advocates advising on cases in 2020, 'run of the mill' or otherwise, even on the basis that this was advice sought by the DPP from senior treasury counsel in a case of significant interest. This is a very specific advice on a point of law from many years ago and it has been acknowledged that no reference in it is made to any particular prosecution or defendant (although I accept that it was obtained with a particular prosecution in mind). Prosecuting advocates in live cases today would, in my view, recognize the special factors in this case and would continue to provide robust and independent advice in accordance with their professional duties and the Faquharson guidelines.

41. However, the fact that I am sceptical about the strength of the CPS claimed additional factors in support of the public interest in non-disclosure, does not necessarily lead to a conclusion that the advice should be disclosed. Indeed, it is my view that the public interest in disclosure is not at least equal to or greater than the 'in-built' public interest in non-disclosure. I accept the submission made by the CPS that the public interest factors in favour of disclosure raised by the Commissioner do not, in fact, add up to very much.

42. In relation to the constitutional importance of the case as emphasized by Mr Perry, it should be noted that in *Corderoy* the Upper Tribunal at paragraph 76 found that: -

> 'The importance of the issue and the public interest in the issue works both ways because it supports the need for frankness and confidentiality between client and lawyer on the one hand and the arguments in favour of transparency and fully informed debate on the other'.

43. Thus, the fact that the advice sought was on an issue of constitutional importance, can provide an additional public interest reason for non-disclosure as well as a reason for disclosure

44. Mr Perry also relied on the fact that no prejudice would be caused if there were disclosure of this document, as an issue which added to the public interest in favour of disclosure. He referred as a summary of the factors supporting this to paragraph 41 of Commissioner's decision which states that '…the legal note is 17 years old…it is general in nature and does not make any direct reference to the court proceedings in question'.

45. As indicated above, I largely accept that argument that no prejudice will be cause by disclosure of the advice, and I think that the possibility of disclosure in this case leading to any kind of opening of floodgates would be very unlikely, or that disclosure in this case would risk a miscarriage of justice. However, I also note, as explained above, that no prejudice has to be identified for the 'in-built' public interest in non-disclosure in LPP cases to apply.

46. I accept that the length of time since the advice was provided is also a factor which could be of some importance. However, there is nothing in the case law which suggests that the age of the advice lessens the 'in-built' public interest in non-disclosure. It might be that the age of the advice would lessen the 'additional factors' relied upon by the CPS but, as set out above, I have given those little

weight in any event. I also accept that if the advice provided is still current (as it is said to be in this case) and about an issue that is still said to be live, then the fact that the advice was provided some years ago is not a factor which would point towards disclosure.

47. I also do not agree that the advice, even if it is current, amounts to a CPS 'policy' on the issue in question which elevates the public interest in disclosure. It remains legal advice (albeit paid for by the public purse) and, as the CPS argue, anyone is entitled to obtain their own advice on the issue, taking into account, if thought relevant, the additional Article 6 issues raised by Prof Callender Smith.

48. In the end, despite Mr Perry's best efforts on behalf of the Commissioner, it is my view that the Commissioner erred in finding that the public interest in disclosure outweighed the significant 'in-built' public interest in non-disclosure demanded by the case-law in s42 FOIA cases. For the reasons set out above the public interest in disclosure, based largely on transparency, accountability, lack of prejudice and the constitutional importance of the issue, was not strong enough to equal or override that significant 'in-built' public interest, even in a case where I am prepared to accept that little or no prejudice would have been caused by disclosure.

49. That finding is sufficient to dispose of the appeal in favour of the CPS and I do not need to go on to consider the reliance placed on s30 FOIA. Suffice to say that both parties accepted that the same considerations would be taken into account in relation to s30 FOIA and the public interest in disclosure or non-disclosure thereunder, as have been considered for s42 FOIA.

CONCLUSION

50. This appeal is allowed. This determination will stand as a substituted decision notice in this case. No further action is required by the CPS.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 21 October 2020.

Amended pursuant to rule 40, 26 October 2020.