



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0075
Information Commissioner's Ref: FS50099396

Heard at Procession House, London, EC4
On 8th February 2008

Decision Promulgated
26 February 2008

BEFORE

CHAIRMAN

ANNABEL PILLING
and

LAY MEMBERS

JOHN RANDALL
ANDREW WHETNALL

Between

ANDRAS SZUCS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

UK INTELLECTUAL PROPERTY OFFICE

Additional Party

Representation:

For the Appellant: Andras Szucs
For the Respondent: Timothy Pitt-Payne
For the Additional Party: Cecilia Ivimy

Decision

The Tribunal upholds the decision notice dated 3rd July 2007 and dismisses the appeal.

Reasons for Decision

Introduction

1. This is an appeal by Mr. Andras Szucs against a Decision Notice issued by the Information Commissioner dated 3rd July 2007. The Decision Notice relates to a request for information made by Mr. Szucs to the UK Intellectual Property Office (formerly The Patent Office) (the 'UKIPO') under the Freedom of Information Act 2000 (FOIA').

Background

2. This appeal arises out of a complex and long-running dispute between Mr. Szucs, his former employer and the UKIPO, about certain patent applications.
3. It is not necessary for us to outline in detail the history of the matter. Arising from the dispute over the patent applications, Mr. Szucs made a complaint in October 1989 alleging misconduct by a Patent Agent. The Register of Patent Agent Rules 1978 (the 'RPAR') made under the Patent Act 1977 provides for the investigation of any allegation of misconduct by a Patent Agent. Where, after due enquiry, the misconduct is shown to have occurred, the RPAR provides for the suspension of the Patent Agent and the removal of his or her name from the Register of Patent Agents.
4. Rule 14 of the RPAR envisages a simple regime under which the alleged misconduct by a Patent Agent may be investigated. The procedure is that once a complaint has been received, the investigation is delegated to the Comptroller who invites the person about whom the complaint has been made to make a confidential statement in reply.

5. This statement remains confidential unless the Comptroller is not satisfied that there had been no discreditable conduct, in which case a hearing is ordered and the statement would be provided to the complainant. If the Comptroller is not satisfied that there had been any discreditable conduct, the parties are so informed and no further action taken.
6. As part of the investigation following Mr. Szucs' complaint, an Assistant Comptroller sent a copy of the complaint to the relevant Patent Agent and invited him to respond. The Patent Agent did so by letter dated 21st November 1989 and it is this document that has been withheld and is at the centre of this appeal. The complaint progressed and a decision, that there was no evidence of misconduct discreditable to a Patent Agent, was reached. The parties were informed of the decision and no further action was taken.
7. Since 1990, Mr. Szucs has pursued his complaints against the Patent Agent and the Patent Office in a number of different forums.

The request for information

8. By letter dated 2nd February 2005, Mr. Szucs requested that the UKIPO grant him access to all the relevant files on his complaint going back to 1989, as outlined in earlier correspondence.
9. The UKIPO sent an interim reply on 3rd March 2005 and replied substantively on 24th March 2005. The UKIPO indicated that it was disclosing almost all of the material referred to, apart from the letter dated 21st November 1989 of the Patent Agent (the 'disputed information'). This was withheld on the basis that it was exempt from disclosure under section 32(2)(a) and section 41 of the FOIA.
10. Mr. Szucs requested an internal review on 22nd November 2005. The internal review upheld the decision to withhold the information on the grounds that it was exempt from disclosure under section 32(2)(a). The outcome of the internal review was communicated to Mr. Szucs on 6th December 2005.

The complaint to the Information Commissioner

11. Mr. Szucs contacted the Information Commissioner on 14th December 2005 to complain about the way his request had been handled. He asked that the UKIPO's refusal to disclose the statement of the Patent Agent be investigated.
12. The Information Commissioner investigated the complaint and concluded that the disputed information was exempt from disclosure under section 32(2)(a) of the FOIA and that, therefore, the UKIPO had dealt with the request in accordance with the FOIA. A Decision Notice was issued on 3rd July 2007.

The appeal to the Tribunal

13. Mr. Szucs appealed to the Tribunal on 30th July 2007.
14. The ground of appeal is that the disputed information did not fall within the exemption from disclosure under section 32(2)(a) of the FOIA.
15. The Tribunal joined the UKIPO as an additional party.
16. The appeal has determined without a hearing on the basis of written submissions and an agreed bundle of documents.
17. In addition, the Tribunal was provided with a copy of the disputed information. This was not made available to Mr. Szucs, as to disclose it to him would defeat the purpose of this appeal.
18. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

The Powers of the Tribunal

19. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) 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.

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

20. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

21. The question of whether the information falls within the exemption in section 32(2)(a) of the FOIA is engaged is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

22. The Tribunal has concluded that the relevant issues in this appeal are as follows:

- 1) Was the inquiry into the complaint against the Patent Agent made by Mr. Szucs an inquiry held under any provision contained in, or made under, any enactment?
- 2) If so, is the disputed information held by the UKIPO only by virtue of being contained in a document that was placed in the custody of a person conducting an inquiry, for the purposes of the inquiry?
- 3) Has the UKIPO been inconsistent in its application of section 32 of the FOIA?
- 4) Has there been inconsistency by the UKIPO in dealing with Mr. Szucs' request for information under the FOIA?

Legal submissions and analysis

23. A public authority need not comply with the duty to disclose under section 1 of the FOIA where any of the absolute exemptions provided for by the FOIA apply. Section 32 of the FOIA is an absolute exemption.

24. Section 32(2) of the FOIA provides as follows:

Information held by a public authority is exempt information if it is held only by virtue of being contained in-

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

25. "Inquiry" is defined in section 32(4)(c) as-

any inquiry or hearing held under any provision contained in, or made under, an enactment.

Was the inquiry into the complaint against the Patent Agent made by Mr. Szucs an inquiry held under any provision contained in, or made under, any enactment?

26. Following Mr. Szucs' complaint against the Patent Agent an inquiry was conducted by the Assistant Comptroller. As part of the inquiry, the Patent Agent's written representations to the complaint were sought and obtained. Mr. Szucs submits that the inquiry was not properly conducted and that due enquiry into the Patent Agent's conduct and the possible removal of his name from the Register were not the prime considerations.

27. The question for us is whether the inquiry was held under any provision contained in or made under any enactment and not whether that inquiry was conducted properly or not.

28. The inquiry was conducted under Rule 14 of the RPAR. The RPAR were made under the Patent Act 1977. We are satisfied that the Patent Act 1977 is an enactment and that, therefore, the inquiry was held under a provision made under an enactment.

If so, is the disputed information held by the UKIPO only by virtue of being contained in a document that was placed in the custody of a person conducting an inquiry, for the purposes of the inquiry?

29. Mr. Szucs submits that the disputed information is held by the UKIPO as part of a file forming a bundle with four associated bundles containing records on the handing of his complaints by the UKIPO and their actions over the period of fourteen years.

30. We accept the evidence that the disputed information was requested by, and provided to, the UKIPO solely for the purposes of the inquiry into Mr. Szucs' complaint. The Patent Agent may have assumed, reasonably, that this would remain confidential, unless and until the Comptroller was satisfied, after due enquiry, that there was a prima facie case of discreditable conduct and a hearing was ordered.

31. It follows that the disputed information came into the possession of the UKIPO only by virtue of it being contained in a document that was placed in the custody of the Assistant Comptroller conducting the inquiry into Mr. Szucs' complaint.

32. Whether such a document is then filed by the public authority with papers that relate to matters other than that discrete issue is entirely irrelevant.

33. There is evidence that no copies of the disputed information have been made by the UKIPO for placement of files held by government organisations, other than on UKIPO files relating to the inquiry. This seems to us also to be irrelevant; even if it had been copied and filed elsewhere by the UKIPO, the information is still held by virtue of being contained in a document that was placed in the custody of the Assistant Comptroller conducting the inquiry into Mr. Szucs' complaint, regardless of where it may have been filed subsequently.

Has the UKIPO been inconsistent in its application of section 32 of the FOIA?

34. Mr. Szucs submits that the UKIPO originally relied solely on the exemption under section 41 of the FOIA as the basis for withholding the disputed information, and only subsequently raised the exemption under section 32(2)(a) of the FOIA. He submits that they should not be entitled to raise any other exemption if not raised initially.

35. This submission is factually incorrect and legally irrelevant. In the original refusal to disclose the information, the UKIPO relied on both section 32(2)(a) and section 41 of the FOIA. In any event, if any exemption under any provision of the FOIA is applicable, then the information sought is exempt from disclosure, regardless of the stage at which the exemption was raised by the public authority.

Has there been inconsistency by the UKIPO in dealing with Mr. Szucs' request for information under the FOIA?

36. Mr. Szucs submits that the UKIPO has been inconsistent in dealing with his request for information. He submits that as other documents have been disclosed that could have been withheld under section 32(2)(a), the UKIPO must be directed to be consistent and to disclose the disputed information also.

37. We do not consider that there is any merit in this point. All this point establishes (if it is correct) is that the UKIPO has disclosed certain information that it would have been entitled to withhold under the exemptions provided for in the FOIA.

Conclusion and remedy

38. A number of points have been raised by Mr. Szucs, and much material provided, that have no direct bearing on this appeal and are not within the jurisdiction of this Tribunal. In particular, we cannot comment on the merits of the original patent applications and the subsequent disputes and complaints.

39. For the reasons set out above, we have concluded that the disputed information is held by the UKIPO only by virtue of it being contained in a document that was placed in the custody of the Assistant Comptroller conducting the inquiry into Mr. Szucs' complaint. The exemption in section 32(2)(a) of the FOIA is therefore engaged and this is an absolute exemption from disclosure. The Tribunal dismisses the appeal and upholds the Decision Notice.

40. Our decision is unanimous.

Signed

Annabel Pilling

Deputy Chairman

Date 8th February 2008