Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0011
Information Commissioner's Ref: FS50082127

Between

DERMOD O'BRIEN QC

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM
(formerly DEPARTMENT OF TRADE AND INDUSTRY)

Additional Party

Representation:
The Appellant in person
For the Respondent: Ms Proops
For the Additional Party: Mr Havers QC

Subject
FOIA Legal professional privilege s.42

Cases:
Bellamy v Information Commissioner EA/2005/0023
DFES v IC EA/2006/0010
Gilby v Information Commissioner & Foreign and Commonwealth Office EA/2007/0071 & 007 & 0079
Fuller v Information commissioner & Ministry of Justice EA/2005/0028
Kessler v Information Commissioner EA/2007/0042
Mersey Tunnel Users Association v Information Commissioner & Mersey Tunnel EA/2008/0035
R v Derby Magistrates Court ex parte P [1996] 1 AC487
USP Strategies Plc v London General Holdings Ltd (No.2) [2004] EWHC 373 (Ch)
DBERR v Information Commissioner & Friends of the Earth EA/2007/0072
Office of Government Commerce v ICO & HM Attorney General [2008] EWHC 774
BERR v IC & O'Brien [2009] EWHC 164 (QB)
Sweden v Council of the European Union [2009] 2WLR

Decision

The Tribunal dismisses the part of this appeal which relates to the Additional Party's reliance upon the legal professional privilege exemption in section 42 Freedom of Information Act 2000.

Reasons for the Decision

1. This appeal arises from a request by Mr O'Brien QC for information relating to regulation 17 of the Part-Time Workers Regulations 2000 ("the Regulations"). The letter of request, dated 13 April 2005, was to the Department for Trade and Industry, subsequently known as the Department for Business, Enterprise and Regulatory Reform ("DBERR") and now known as the Department for Business, Innovation & Skills. In this appeal, for convenience, we will refer to the Respondent as DBERR. Mr O'Brien sought disclosure of the following information:

   > *'all documents relating to the inclusion of what became Regulation 17 including, but not limited to, all letters, memoranda, emails, minutes and drafts produced internally or passing between DTI and the Lord Chancellor's Department/Department for Constitutional Affairs and/or the Treasury and/or the Department for Work and Pensions and/or any other person or body relating to the form or, the reasons and justifications for and/or validity of regulation 17'*

2. DBERR refused to disclose almost all of the information then found, relying upon sections 35, 36 and 42 of the Freedom of Information Act 2000 ("the Act"). Mr O'Brien complained to the Information Commissioner ("IC") who in turn issued a decision notice dated 8 January 2008 upholding DBERR's refusal of the request. Mr O'Brien appealed the IC's decision to the Information Tribunal.

3. The appeal was in fact first heard by a differently constituted Information Tribunal on 7 October 2008 ("the first Tribunal"). That Tribunal ordered disclosure of almost all of the disputed information. DBERR appealed the Tribunal's decision to the High Court. On 11 February 2009 Mr Justice Wynn Williams upheld the part of the decision which related to DBERR's reliance upon the exemption in section 35 (formulation of government policy and Ministerial correspondence) and quashed that in relation to the exemption in section 42 (legal professional privilege) (*DBERR v IC & O'Brien* [2009] EWHC 164 (QB). He ordered that that part of the decision be remitted

to a freshly constituted Information Tribunal to hear the matter afresh. This therefore is the task of this Tribunal.

4. At the time of refusal of the request (which we take as the letter following the internal review of refusal, dated 21 June 2005) DBERR had released just two items of information. It maintained its refusal in relation to all other information. During the course of preparation for the first Information Tribunal's hearing, DBERR located two more documents. Subsequent to the first Tribunal's order that DBERR look further for documents which it believed must exist, the Department located a further 16 documents. The Department refused to disclose almost all of this new information.

5. As a result of that part of the first Tribunal's decision which was upheld by the High Court and a decision by this Tribunal on a preliminary point, DBERR has now released a significant proportion of the information sought by Mr O'Brien. This was the information in relation to which DBERR sought to rely upon the section 35 exemption ("the disclosed section 35 information"). The remaining information, the subject of this hearing, is that which DBERR seeks to withhold on the basis of the exemption in section 42. The disputed information for this hearing is a set of 16 documents ("the disputed section 42 information").

6. In relation to the disputed section 42 information, all parties agree that the relevant questions are:

    a) Is the section 42 exemption engaged?

    b) If so, did the IC err in his approach to section 42, in concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure?

7. The Tribunal heard from Mr Bill Wells, Director of Employment and Market Analysis and Research at DBERR and was provided with the witness statement of Mr Matthew Hilton, who had given oral evidence at the first Tribunal. Part of the oral evidence and submissions of the parties were necessarily taken in closed session as they concerned the disputed section 42 information. The Tribunal had sight of the disputed information.

Background

8. In late 1999, the Government was undertaking the process of implementation of the Framework Agreement on Part-Time Work, ("the Directive"). As a result DBERR, as the lead Department, was formulating the necessary policy and drafting the implementing regulations. In December, the Lord Chancellor's Department ("LCD"), now known as the Ministry of Justice (but referred to in this decision

for convenience as LCD), wrote to DBERR to raise a matter of concern, namely the position of part-time judicial office holders under the Directive. LCD desired an express exclusion in the Regulations to put beyond doubt that these individuals would not benefit from the rights under the Regulations. Thus, part-time judicial office holders would not enjoy the rights against discrimination otherwise provided under the Regulations.

9. There followed a series of communications (letters and emails) between the two departments and internal emails between officials and lawyers. It is this information which makes up the disclosed section 35 information and the withheld disputed section 42 information. It is clear from what has been disclosed that there was some disagreement as to whether the exclusion should be relied upon at all and if so, whether it should be a ‘belt and braces’ provision to put it beyond doubt that part-time judicial office holders did not fall within the Directive, or an exclusion under the clause 2(2) derogation for “casual workers” (with the completely contrary implication that they do fall within the scope of the Directive).

10. Before the matter was resolved, the Government put out draft Regulations for consultation (17 January 2000). There was no mention whatsoever of the possible exclusion of part-time judicial office holders from the scope of the Regulations. By 17 April 2000 it had been decided that the exclusion should be included. The Regulations were enacted on 8 June 2000. Regulation 17 provides that the Regulations do not apply to *“any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee paid basis”*.

11. On 1 September 2000, Mr Wheeldon, a part-time judicial officer holder wrote to the LCD and his MP raising concerns over regulation 17. A response was sent from LCD setting out a rationale for the exclusion of such office holders from the Regulations. This gave as the rationale that the Government’s view was that such persons were not “workers” under the Directive and that the exclusion put the matter beyond doubt. There was no mention of the exclusion being further to the clause 2(2) derogation under the Directive for “casual workers”.

12. Mr O’Brien is currently pursuing a claim for discrimination under the Regulations and has recently, further to the disclosure of the section 35 information, received leave to appeal to the House of Lords.

The Law

13. This Tribunal’s jurisdiction in relation to appeals is set out in section 58 of the Act. For the purposes of this appeal, the Tribunal must consider whether the Decision Notice is in accordance with law. The starting point is the Decision Notice itself but the Tribunal is free to review

findings of fact made by the IC and to receive and hear evidence which is not limited to that before the IC. In cases involving the so-called public interest test in section 2(2)(b) a mixed question of law and fact is involved. If the Tribunal comes to a different conclusion under section 2(2)(b) on the same or differently decided facts, that will lead to a finding that the Decision Notice was not in accordance with the law.

14. Section 42, which is contained in Part II of the Act, provides:

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

15. In determining whether the section 42 exemption is engaged, the Tribunal had regard to the scope of legal professional privilege ("LPP"). A differently constituted Information Tribunal in the case of *Bellamy v ICE & Secretary of State for Trade and Industry* EA/2005/0023 provided the following guidance as to scope of LPP, which we gratefully adopt:

> *"9. In general, the notion of legal professional privilege can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation. A further distinction has grown up between legal advice privilege and litigation privilege. Again, in general terms, the former covers communications relating to the provision of legal advice, whereas the latter, as the term suggests, encompasses communications which might include exchanges between those parties, where the sole or dominant purpose of the communications is that they relate to any litigation which might be in contemplation, quite apart from where it is already in existence".*

16. It is not in dispute in this appeal that only legal advice LPP is relevant to the disputed section 42 information. Legal advice LPP attaches to communications between a lawyer and client for purpose of obtaining legal advice (although there was a litigation context in which the legal advice was being given – see below – the advice was not directly linked to any particular litigation, actual or proposed). It is also not in dispute that legal advice LPP extends beyond communications between lawyer and client to those with third parties where they contain evidence of the privileged advice (see *USP Strategies Plc v London General Holdings Ltd (No.2) [2004] EWHC 373 (Ch),* paragraph 20).

17. After forming a view on whether LPP applies, our task then is to consider the public interest balancing test in section 2(2) of the Act. Section 2(2), provides:

    "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 -
    ………

    (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing information".

18. To this end, the Tribunal must consider *"all the circumstances of the case"* and to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The Tribunal reminded itself that the way in which the public interest test in section 2(2) is constructed creates a presumption in favour of disclosure. Thus the burden of proof remains on the public authority to satisfy the Tribunal that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure (*DFES v IC* EA/2006/10 paragraphs 61 & 64).

19. An issue which arose in this case was the date upon which the Tribunal is to assess the public interest for the purposes of section 2(2). In this case, the date of the letter upholding the refusal on internal review was 21 June 2005 ("the internal review refusal letter"). Mr O'Brien at one point sought to argue that insofar as further documents had been discovered subsequent to the internal review refusal letter and DBERR had written to Mr O'Brien refusing to disclose these, the appropriate date for assessing the public interest is the dates of those letters. In this regard, he drew our attention to the case of *Gilby v Information Commissioner & Foreign and Commonwealth Office* EA/2007/0071 & 007 & 0079 where, at paragraph 50, it was said *"the time for the consideration whether there should be disclosure of the information, including the public interest balance, should include the whole of the process, including where applicable, any reconsideration on review"*. The Tribunal noted however that in that case there had not, as here, been discovery of documents subsequent to the internal refusal review letter. The decision ought not therefore to be taken as suggesting that the relevant date for the purposes of the public interest test should be taken as any later than the refusal on internal review. The Tribunal agreed with the approach of previous differently constituted Information Tribunals, summed up in the case of *DBERR v Information Commissioner & Friends of the Earth* EA/2007/0072 at paragraph 110 that *"the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss. 10 [time limits] and 17 [letter of refusal] FOIA".* Thus, the Tribunal proceeded

on the basis that the relevant date for the purposes of the public interest test was that of the internal review refusal letter.

20. Mr Justice Wynn Williams in the High Court hearing of this appeal, upheld a line of Tribunal cases in which it was determined that there is a significant in-built weight of public interest in maintaining the exemption under section 42. This is on account of the strong constitutional importance attached to LPP and thereby the protection of free and frank communications between lawyers and their clients. This was summed up in the case of *R v Derby Magistrates Court ex parte P* [1996] 1 AC487, where Lord Taylor stated, at page 507D:

> *"Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests".*

21. Mr Justice Wynn Williams in the High Court hearing of his appeal stated at paragraphs 41 and 53 of his judgement:

> "*It is also common ground, however, that the task of the Tribunal, ultimately, is to apply the test formulated in section 2(2)(b). A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back-door" to an absolute exemption. As [counsel for the IC] submits in her Skeleton Argument, 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 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.*
>
> *……………………………….*
>
> *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".*

22. The Tribunal found useful the indications from differently constituted Tribunals of the sorts of factors that might constitute a public interest in favour of disclosure that equalled or outweighed the significant in-built public interest arising from LPP. Thus, in the case of *Fuller v Information commissioner & Ministry of Justice* EA/2008/0005, it was said at paragraph 12:

> *"There will be some cases in which there could be stronger contrary interests; for example, if the privileged material discloses wrongdoing by or within the authority or a misrepresentation to the public of the advice received or an apparently irresponsible and wilful disregard of advice, which was merely uncongenial".*

Is section 42 engaged?

23. The Tribunal considered that all of the disputed section 42 information fell within the scope of the legal advice LPP. The documents in question all fall within either lawyer to client communications seeking or giving legal advice or other communications evidencing the legal advice itself.

24. Mr O'Brien invited the Tribunal to consider whether any of the information fell outside LPP on the grounds that it could properly be categorised as a Department putting forward a policy objective rather than legal advice sought or received.

25. Mr Wells said in his statement that, in his view, LPP applied to all of the disputed section 42 information on the basis that, where the communications were not directly between officers and lawyers, it evidenced the content of legal advice. During his oral evidence however, he changed his view in relation to certain documents and relied instead upon the fact that lawyers had been copied in and therefore the information was properly part of officials seeking advice from lawyers.

26. The Tribunal agreed with this on the basis that it could be reasonably inferred from the documents themselves that lawyers were being copied in in order to complete their instructions. In its view the officials were thereby asking the lawyers to respond with advice if anything raised in the communication was legally incorrect.

Mr Wells had also given evidence that the disclosure of legal advice in certain of the disclosed section 35 documents had been 'inadvertent'. Mr O'Brien, rightly pointed out that as to whether there had been any waiver, the correct approach was primarily an objective one – the intentions of DBERR whilst relevant were not determinative. The Tribunal accepted however the submissions of the IC and DBERR that waiver did not arise, as a matter of law, as it did not apply to partial

disclosure of privileged information outside the context of litigation (see the case of *Kessler v Information Commissioner EA/2007/0042*, paragraph 44).

27. The Tribunal was satisfied that the content of the disputed section 42 information either consisted of legal advice being sought or given or evidenced such advice. As such it fell within LPP and the exemption in section 42 was engaged.

The Public Interest Test

28. The Tribunal noted that approximately 8,000- 8,500 part-time judicial holders would have been affected by the inclusion of regulation 17 in 2005. It was only at the hearing itself that any sense of the numbers of individuals affected had been clarified. In fact Mr Wells had said in evidence that he thought the number was in the hundreds. However, further to research by Mr O'Brien from information available on the internet, the above numbers were agreed between the parties.

29. In the Tribunal's view, taking into account the financial consequences which would flow from regulation 17 and the potential knock-on effects to other employment rights, this was a matter of some public importance. This cut both ways however in terms of the public interest test as whilst it enhanced the importance of the issue to the Government and the need therefore for sound legal advice it also meant that there would be significant public interest on account of the implications for public expenditure.

Factors against disclosure

30. The Tribunal's starting point was to accord significant weight to the in-built public interest in the section 42 exemption. The Tribunal considered from the submissions and evidence before it, whether there were any factors particular to this case which would operate to enhance or lessen this in-built weight.

31. The Tribunal noted that Mr Wells had conceded in evidence that governmental lawyers were not likely to be criticised if they did record their advice, but may well be if they did not. As such, Mr O'Brien submitted that the evidence before the Tribunal was that the effect of the Act would not be to discourage the recording of advice, contrary to the evidence of Mr Wells in his statement. The Tribunal was of the view that insofar as there was any inconsistency in Mr Well's testimony in this regard, this was as a result of the skill of Mr O'Brien's cross examination rather than the considered position of the witness. Indeed, Mr Wells had told the Tribunal in evidence that, in his view, if it was thought that legal advice might have to be disclosed at some point in the future the lawyers' task would be compromised by their having to consider factors other than the giving of candid advice (in particular tailoring advice to reflect what might be the Government's final position

on a particular point). He also considered that there would be a risk that lawyers would be less likely to record their advice in writing.

32. The Tribunal saw no reason not to accept Mr Well's testimony on these points and noted that they supported the well established principle that there should be significant weight attached to the in-built public interest in favour of maintaining the exemption.

33. In this case, there was the further specific public interest against disclosure in that the Government was facing a real prospect of litigation at the relevant date. For the purposes of the public interest balancing test, the relevant date was the date of the internal review refusal letter, 21 June 2005. The Tribunal took into account references in a letter from an LCD official to a DBERR official dated 23 March 1999 that *"you may perhaps be aware that we are currently involved in arguments about whether the Working Time Regulations so apply; our view is that they do not, but at least one group of judicial office-holders maintains they do. It seems that very much the same arguments are likely to arise in connection with the Employment Relations Bill".*

34. A letter from an official in the Decision Making and Appeals section of the Department of Social Security to an official in DBERR, dated 24 February 2000 stated:

> *"We are particularly concerned about this issue in the light of a current challenge to an Employment Tribunal that judicial office holders are "workers" with in the provisions of the Working Time Regulations 1998. Similarly, in the Northern Ireland case of Percival-Price, tribunal chairmen were found to be workers for the purpose of Article 141 (formerly Article 119) of the EC Treaty and the Equal Treatment Directive."*

35. The Tribunal also took into account an email from a DBERR official to DBERR lawyers and other officials dated 24 February 2000 which commented *"This may be overtaken by discussions on coverage of employee/worker. If not, and we stick with our definition of employee, we will need to decide whether giving LCD an exemption for judicial office-holders could undermine our own attempts to resist later legal challenges on the coverage of workers."*

36. The Tribunal also noted that the letter from Mr Wheeldon in September 2000 had flagged up his perceived rights under the Directive and, in the Tribunal's view, issued a veiled threat that he may pursue those rights in the absence of a satisfactory response.

37. A Confidential Annex gives details of further indications of the litigation context contained within the disputed section 42 information.

38. On 9 June 2005 Mr O'Brien himself had written to the Department of

Constitutional Affairs to request that he not be discriminated against under the Regulations. Thus prior to the internal review refusal letter, the Government had received a claim from a part time judicial office holder, testing the limits of the Regulations. The Tribunal reminded itself however that the Act is requester and motive blind such that Mr O'Brien's intentions behind making the request are irrelevant. Mr O'Brien is moreover entitled to make a FOIA request for the purposes of determining whether he wishes to commence litigation.

39. The Tribunal considered, however, that given the activities of other judicial office-holders in testing the application of European legislation in domestic employment law, it was a reasonable inference to draw that Mr O'Brien's letter gave rise to a real prospect of litigation. This was to take into account the fact that there was potential litigation, not the motive behind the request. This was an important distinction.

40. The Tribunal considered that even without the prospect of litigation by Mr O'Brien, the circumstances which applied at the relevant time, as set out in paragraphs 32-35 above and the Confidential Annex, created a litigation background, both actual and prospective.

41. Thus the Tribunal was of the view that the legal advice was very much 'live' at the relevant date. The Tribunal did not, in this regard, accept Mr O'Brien's submission that since regulation 17 had not been amended since the date of enactment, the section 42 disputed information was of only historic importance and was no longer 'live' in the sense of being relied upon. Whilst in other contexts, the passage of time since the information was created can be an important factor in relation to public interest test, this was less so in this case. The critical factor was whether the legally privileged information remained sensitive either because it was relied upon or because it could be deployed in actual or prospective litigation.

Factors in favour of disclosure

42. The Tribunal found the following factors to be in favour of disclosure.

43. The Tribunal considered that there is a public interest in favour of disclosure insofar as it would assist the public's understanding of the Government's legislative process in this case and thereby promote transparency and accountability.

44. This was enhanced by the fact that despite the LCD having raised its wish for an exclusion for part-time judicial office holders as far back as March 1999, regulation 17 was not included in the draft regulations which went out for consultation in January 2000. It was impossible to see on the face of the documents what could possibly have justified this failure. Given this and the absence of any other published explanation for the regulation 17 exclusion, the Tribunal could easily

identify a public interest in better understanding the background to this legislative process.

45. It had been alleged by Mr O'Brien that regulation 17 had been enacted in some haste or 'slipped in'. Given the dates above and the reasonable inference that this matter could have been sorted out prior to consultation, the Tribunal considered that this gave rise to a public interest in disclosure. It was of the view that disclosure of the disputed section 42 information would shed some light on this matter.

46. Also of some weight was the fact that, as had become public from the disclosure of a memorandum dated 29th October 2000 from an official in DBERR to LCD, there had been some disagreement between officials and lawyers as to the rationale for the inclusion of regulation 17. The memorandum states:

> *"2. There is a real difficulty in that, in our [DBERR's] view, regulation 17 of the Part Time Worker Regulations was inserted on the basis of Clause 2(2) of the original directive, which enabled us to exclude casual workers. Your (LCD's) view is that regulation 17 was a "for the avoidance of doubt" measure, based on the fact that judicial office holders are in any event not within the scope of a directive, and a set of regulations, which apply to "workers". Given that regulation 17 was inserted very much at your behest, and that Hayden Phillips has already written to the President of the Council of Immigration Judges, the attached draft follows your line."*

47. It appears the draft letter which was attached to that memorandum which set out the 'belt and braces' rationale, went on to form the basis of the letter which was sent to Mr Wheeldon in October 2000. The same reasons were used in the first refusal letter sent to Mr O'Brien dated 17 May 2005. The only public statements as to the rationale had therefore been via these two letters. No mention was made of clause 2(2) and the derogation for "casual workers". Of particular concern was that the letter to Mr Wheeldon stated that *"I know that the Lord Chancellors Department share the view that part time judicial office holders are not workers for the purposes of the Part Time Work Directive."* This is to be contrasted with the memorandum of 29th October 2000 (above) and DBERR's purported reliance there upon clause 2(2) (with the necessary implication that part-time judicial officer holders do come within the terms of the Directive). The Tribunal accepted Mr O'Brien's submission that there was considerable confusion as to the basis upon which the provision had been included and at least a reasonable suspicion that Mr Wheeldon and thereby the public, had received a misleading version of the rationale. In the Tribunal's view, disclosure of the disputed section 42 information would enhance both transparency and accountability and go some way to remedying the understandable doubt created by the disclosure to date.

48. Both DBERR and the IC invited the Tribunal to consider the usefulness of disclosing the disputed section 42 information, in the light of the disclosure already made of the section 35 information. It was submitted that it would not shed any or any significant further light on the issues identified by Mr O'Brien. As such, it was asserted, the public interest in disclosure was lessened. The Tribunal did not however consider this to be the correct approach as the relevant date for the purposes of the public interest balancing test was the internal review refusal letter 21 June 2005. Thus, the subsequent disclosure, made as a result of Mr O'Brien's tenacity in pursuing this appeal, ought not to be used against his request.

49. In this regard the Tribunal considered it unfortunate that the inconsistent claiming of exemptions by DBERR had resulted in the disclosure of evidence of certain legal advice in the section 35 information. DBERR had informed this Tribunal that these disclosures had been 'inadvertent' and section 42 should have been claimed. The net result of this, and to an extent the fact that this appeal had been partially decided by a previous Tribunal and the High Court, was that certain anomalies had arisen in what had been withheld and what disclosed.

50. It was argued by Mr O'Brien that a further factor in favour of disclosure would be ascertaining whether the lawyers at DBERR and LCD had carried out a proper and professional job. In favour of this argument he pointed to what he called the 'self-evidently' wrong suggestion by DBERR that the Government could rely upon clause 2(2) of the Directive for the purposes of regulation 17. It was argued by DBERR, and accepted by the Tribunal that it was not possible for it to assess on the basis of the information before it whether the lawyers' advice had been adequate and professional. The Tribunal was of the view moreover that, save in exceptional circumstances, it would not be in the public interest for disclosure to be made primarily on this ground. This was essentially a matter between lawyer and client, and not for a Tribunal to assess. Exposure of legal advice in order that the public can take a view on its quality was not, moreover in the Tribunal's view, compatible with the inbuilt weight to be given to the principle of confidentiality between lawyer and client.

51. Relevant to the public interest test is whether disclosure of the disputed section 42 information would or would not give rise to any prejudice or harm. The first Tribunal had been of the view that this was not the case. This Tribunal was however of the view that it could not properly assess this issue given the limited information before it. It was clear from the fact that Mr O'Brien had been granted leave to appeal to the House of Lords (an event which post-dated the first Tribunal) that the rationale behind regulation 17 was being hard fought in the courts. The Tribunal was simply not in a position to say whether at the relevant date, bearing in mind the real prospect of litigation,

disclosure of the disputed section 42 information would or would not have given rise to any prejudice to the Government's position.

52. It was further submitted by Mr O'Brien, that the Tribunal should weigh into the balance in favour of disclosure, a recent case before the European Court of Justice. The Tribunal's attention was drawn to the case of *Sweden v Council of the European Union [2009] 2WLR*, in which the Court had ordered under the Regulations regarding public access to European Parliament, Council and Commission documents (no. 1049/2001), the disclosure of a legal opinion. This was despite the provision in those Regulations whereby documents may not be disclosed where to do so would undermine the protection of legal advice unless there is an overriding public interest. Mr O'Brien argued that this Tribunal should be guided, albeit not bound, by the European approach to freedom of information and the disclosure of Government legal advice. He sought to pray in aid extracts from the House of Lords European Union Committee 15th Report of Session 2008-9 and recommendations made by the Committee, that the UK should as far as possible act consistently with the European Union approach. The IC pointed out that there was no Directive underpinning the Act and as such, it could not be said that the Tribunal was bound, as a matter of law, to follow the Sweden decision. It was also submitted that the Tribunal was not free to rely upon or call into question the proceedings of Parliament (see *Office of Government Commerce v ICO & HM Attorney General [2008] EWHC 774*). DBERR submitted that there were significant differences between the European Regulations and the Freedom of Information Act. In particular, the former only concerned Council documents and did not extend to national or Government documents. The Tribunal considered that whilst of some background interest, given the lack of direct effect and difference in the subject matter of the European Regulations and FOIA, it would not be appropriate, without more, to elevate this to the status of a public interest factor in favour of disclosure.

Application of the public interest test

53. The Tribunal gave careful consideration to where the public interest lay. It noted that there were powerful factors operating on both sides of the balance. The Tribunal was particularly concerned, whilst acknowledging the significant in-built public interest accorded to section 42, not thereby to, in effect, treat this exemption as absolute.

54. It considered cases where disclosure had been ordered by previously constituted Tribunals, in particular *Mersey Tunnel Users Association v Information Commissioner & Mersey Tunnel* EA2007/0052, paragraph 45, where it was said:

> *"Routine disclosure might lead to those consequences [reluctance to seek advice, poorer quality of decision making etc.]. But disclosure under FOIA can never be routine. The*

public interest balance, with its inbuilt weight in favour of maintaining the exemption, must be struck in the particular circumstances of each case. Each will have to be decided on its individual merits and disclosure will only occur if a heavy hurdle – the inbuilt weight – is overcome".

55. The Tribunal was of the view that, had it not been for the litigation context in which the relevant legal advice had been given, it would have concluded that the public interest in favour of disclosure at least equalled the public interest in maintaining the exemption. In these circumstances, the Tribunal would have ordered disclosure of the disputed section 42 information. The Tribunal placed considerable weight on the arguably misleading nature of the communication with Mr Wheeldon and the first refusal letter to Mr O'Brien. It was also mindful of the fact that there had been no consultation on the inclusion of regulation 17. The factors in favour of disclosure (set out in paragraphs 41-46 above) were however trumped, in the Tribunal's view, by the litigation context in which the legal advice had been given. It considered that it would be quite wrong to ignore the fact that there was, at the relevant time, ongoing related litigation and a reasonable prospect of litigation from either Mr Wheeldon or Mr O'Brien.

56. In all the circumstances, the Tribunal was of the view that the public interest in maintaining the exemption outweighed the public interest in disclosure. As such, it dismissed this appeal insofar as it concerned the disputed section 42 information.

57. Finally, having regard to the public's interest in understanding the legislative process, consistent with the comments in the case of *James Kessler v Information Commissioner & HM Commissioners for Revenue & Customs* EA/2007/0043 (see paragraph 81) which also concerned proposed legislation, the Tribunal considered that DBERR could have met the public interest in disclosure not by disclosing the legal advice itself, but by issuing a detailed more accurate rationale for the inclusion of regulation 17.

Section 17 of FOIA

58. Finally, we were invited by the IC to conclude that DBERR was in breach of section 17(2) of the Act insofar as it had failed to confirm that it held the disputed section 42 information in its internal review refusal letter. The Tribunal found that DBERR was therefore in breach of section 17 of the Act.

Conclusion

59. The Tribunal dismisses the appeal insofar as it relates to the disputed section 42 information and finds DBERR to have been in breach of

section 17 of the Act.

60. Our decision is unanimous.

Signed:

Melanie Carter

Deputy Chairwoman   Date: 20 July 2009