IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0096
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50470164
Dated: 8 April 2013

Appellant:	**MICHAEL HAYDEN**
Respondent:	**INFORMATION COMMISIONER**
Heard at:	**MANCHESTER CIVIL JUSTICE CENTRE**
Date of hearing:	**14 October 2013**
Date of decision:	**5 November 2013**

Before

ROBIN CALLENDER SMITH
Judge

and

ANDREW WHETNALL and MICHAEL HAKE
Tribunal Members

Attendances:

For the Appellant: Mr Michael Hayden
For the Respondent: written submissions from Ms Helen Davenport for the Commissioner

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0096
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Subject matter:

FOIA

Qualified exemptions

- Legal professional privilege s.42

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 8 April 2013 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The information requested in this matter by Mr Hayden consists of advice provided to the Association of Chief Police Officers (ACPO) about the legal basis for the National Driver Offender Retraining Scheme (NDORS).

2. This scheme allows for drivers to attend speed awareness courses, for which they must pay, rather than putting themselves at risk of having points placed on their licences.

3. Mr Hayden wanted to see the legal advice in relation to such schemes so that he could assess the legal basis for them and the implications that might flow from them.

The request for information

4. On 21 May 2012, Mr Hayden's Member of Parliament made an information request to the Home Office, the wording of which was paraphrased in the refusal notice as follows:

> ...a copy of the Counsel's opinion that ACPO obtained on [the legality of police offers of Speed Awareness Courses to those detected exceeding the speed limit].

5. The Home Office responded on 27 June 2012. It stated that the request was refused and cited the exemptions provided by sections 41 (information provided in confidence) and 42 (legal professional privilege) of the FOIA.

6. On 8 August 2012 Mr Hayden asked for clarification about whether he could request an internal review, or whether it was necessary for his MP to do this.

7. The Home Office took this as a request for an internal review and responded with the outcome of the review on 3 September 2012. It stated that the refusal under the exemptions cited previously was upheld. Whilst some indication was given to Mr Hayden of what public interest factors were believed to apply in relation to section 42, at no stage was any reasoning given for the citing of section 41.

The complaint to the Information Commissioner

8. Mr Hayden contacted the Commissioner on 22 October 2012 to complain and indicate that he did not agree that the exemptions cited had been applied correctly. He gave detailed reasons for this.

9. The Commissioner – in the Decision Notice - considered, first, the operation of s.42 (1). That provided an exemption for information subject to legal professional privilege. Consideration of the exemption involved a two-stage process; first, the exemption must be engaged as a result of the

information being subject to legal professional privilege. Secondly, this exemption is qualified by the public interest, which meant that the information must be disclosed if the public interest in the maintenance of the exemption did not outweigh the public interest in disclosure.

10. On whether the exemption was engaged, the Commissioner noted that there were two types of legal professional privilege (LPP); advice privilege and litigation privilege. Advice privilege was claimed in this instance. Published guidance from the Commissioner described this as follows:

> Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.

11. The Commissioner took the view that the information in question consisted of advice provided to ACPO on the legal basis for the NDORS. It was clear from the content of this information that this was legal advice provided from qualified legal advisers to ACPO.

12. Mr Hayden had challenged whether the Home Office could claim legal professional privilege in relation to advice that was sought and received by a third party. The Commissioner believed that it could because if the recipient of the legal advice had shown a willingness to disclose this widely, this may have indicated that it had waived LPP.

13. In this case, however, there was no evidence that the information had been disclosed to any third party aside from the Home Office. Providing that information to the Home Office did not constitute a waiver of LPP because the Home Office was responsible for policing. It had an interest - shared with ACPO - on the legality of NDORS. The confidentiality provided by LPP remained intact.

14. Mr Hayden had also challenged whether ACPO was consulted over the requested disclosure of the information and had raised the possibility that

ACPO might consider LPP to have been waived, or be willing to waive it now. The Commissioner's enquiries revealed that the Home Office had consulted ACPO and that ACPO did consider the legal advice in question to be confidential.

15. For those reasons the Commissioner found that this information was subject to LPP and that the exemption provided by s.42 (1) was engaged.

16. In relation to the balance of the public interest the Commissioner took into account the general public interest in the openness and transparency of the Home Office, as well as those factors that apply in relation to the specific information requested.

17. Mr Hayden argued that the public had an interest in reassurance that NDORS had a sound legal basis. The Commissioner agreed that, in general, there was a strong public interest in understanding the legal basis for NDORS. It was a scheme affecting many people and it was in the public interest to remedy any lack of understanding, which the Mr Hayden believed existed, about the legal basis for NDORS.

18. Mr Hayden also referred to the financial situation relating to the courses, pointing to the fee individuals were required to pay to take these courses and the profit generated as a result. The Commissioner agreed that the requirement for individuals to pay for these courses as an alternative to prosecution and the fact that the courses generate a profit emphasised the public interest in understanding the legal justification for them.

19. The Decision Notice recorded a strong public interest in favour of full disclosure of this information in order to inform the public of the legal basis for NDORS, describing it as "a valid public interest factor in favour of disclosure of considerable weight."

20. The factors relating to the public interest in favour of maintenance of the exemption required account to be taken of the in-built public interest in the maintenance of LPP, referring to *Bellamy and Secretary of State for Trade and Industry* (EA/ 2005/0023) [35]:

> ... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest ....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...

21. In *DBERR v Dermod O'Brien* (EWHC 164 (QB)) the High Court cautioned that the inbuilt public interest in legal professional privilege should not mean that section 42(1) was, in effect, elevated to an absolute exemption. While LPP was a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by factors favouring disclosure.

22. The public interest arguments advanced by the Home Office in this case emphasised the inbuilt public interest in the maintenance of LPP and believed that the public interest had been served by the disclosure of what it described as a 'comprehensive summary' of the legal advice in question.

23. Mr Hayden was not satisfied that the summary disclosed sufficiently explained the law allowing for NDORS. However, aside from whether the document could be accurately described as a 'comprehensive summary' of the legal advice in question, the Commissioner took it into account as evidence that an attempt had been made to place an explanation for the legal basis of NDORS into the public domain. If no effort had been made to provide such an explanation, it was possible that the public interest in the information in question might have been sufficient to equal the public interest in the maintenance of LPP. In the event, however, the effort was made to satisfy this public interest, whilst maintaining LPP. As a result, the public interest in the maintenance of LPP outweighed the public interest in disclosure.

24. The Commissioner concluded that, as his decision had been reached on section 42, it had not been necessary to also consider section 41.

The “comprehensive summary” disclosed by the Home Office

25. The “comprehensive summary” disclosed by the Home Office to Mr Hayden is reproduced below to make this judgement more comprehensible:

The legal basis for the National Driving Offender Retraining Scheme

1. Historical background

In 1988 Sir Peter North QC, at the request of the Government, carried out a comprehensive review of Road Traffic offences, methods of detection and penalties. The Road Traffic Law Review 1988, now known simply as the North report, was accepted and acted upon in the Road Traffic Act 1991 which made amendments to existing legislation. This heralded the introduction of a number of new speed detection devices, both manually operated and fully automatic, which in turn led to a very great increase in the number of persons being caught exceeding the speed limit. This increase had been anticipated within the Report which recommended that consideration be given to providing alternatives to formal prosecution of offenders. The following are extracts from the report:

> Retraining of (traffic) offenders may lead to an improvement in their driving (in which term we include both their technical skill and behaviour) particularly if their training can be angled towards their failings"
>
> It must be in the public interest to rectify a fault rather than punish the transgressor
>
> A pilot study of one day retraining in basic driving skills as a disposal should be undertaken to determine if such retraining produces a lasting improvement in the driving skills of the offenders undertaking it.

In due course such a pilot was undertaken and following appropriate evaluation and academic input, the current educational courses have been developed. That evaluation has confirmed that the courses do offer improvements to the driving skills and behaviour of the majority of those who participate in them.

2. The public interest test

In considering where the prosecuting authority, in applying the public interest test, should prefer to rectifying a fault, or treat the matter a s a criminal offence requiring punishment (whether by fixed penalty or court process), those responsible must take into account the availability and known effectiveness of retraining courses. The currently accepted test for public interest was first stated in 1951 by the then Attorney General Sir Hartley Shawcross and has been adopted by the Crown Prosecution Service at paragraphs 4.10 to 4.12 of the current Code for Crown Prosecutors:

> 4.10 ..."It has never been the rule in this country - and I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution."

4.11 Accordingly, where there is sufficient evidence to justify a prosecution or to offer an out of court disposal, prosecutors must go on to consider whether a prosecution is required in the public interest.

4.12 A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against a prosecution which outweigh those tending in favour; or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out of court disposal. The more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest.

3. The prosecuting authority

Prosecutions for speeding and red traffic light offences are "specified proceedings" within the meaning of the Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999/904. As such, the decision to prosecute, up to the point of a not guilty plea or failure to respond, is left in the hands of the Police. Thereafter the Crown Prosecution Service will, if it considers it appropriate, adopt the prosecution but is not bound to do so. The application of the public interest test set out above is therefore initially a matter for the police, who must apply the Code for Crown Prosecutors on behalf of the CPS. See Paragraph 3.1 of the Code.

4. The exercise of discretion

The common law has long acknowledged that in dealing with those believed to be offenders, the police can devise a "constructive and pragmatic" response which has included verbal "warnings" and simple "cautions" - *R (on the application of R) v Durham Constabulary* (2005) WLR 1184. Legislation has built upon this discretion adding formal cautions and latterly conditional cautions to this list of out of court disposals but the power to offer courses remains routed in the common law rather than being based upon statute. The exercise of this discretion therefore rests, as in all such cases, with (a) there being, in the belief of those offering the disposal, sufficient evidence that an offence has been committed and that the offender is the person who committed it (b) an acceptance by the offender that he or she committed the offence (c) the offence being sufficiently minor, and the offenders record of similar behaviour sufficiently small, that the public interest does not require a prosecution. In the case of the offer of a retraining course, there must then be a reasonable belief that the course will be of sufficient benefit that it will be in the public interest to offer it.

Essentially a public body is under a duty to act reasonably whenever it exercises a discretion. That duty was clearly enunciated in the well-known case of *Associated Picture Houses v Wednesbury Corporation* [1948] 1KB 223. Any discretion exercised in a way that is "Wednesbury unreasonable" will be open to attack by Judicial Review of that decision at the behest of a person having *locus standii* to do so, that is to say a person who is affected by the decision. There are two ways in which a decision can be held to be

unreasonable. First the authority must take into account all relevant matters which bear upon that decision and disregard those which would not be germane. Failure to do so is likely to leave the decision open to attack as unreasonable. The second is that, even though all relevant matters were apparently taken into account, the decision reached is "so absurd that no sensible person could ever dream that it lay within the power of his authority."

5. Charging for the course

The decision to offer a course to a driver does not impose any obligation on the driver to attend the course. The driver retains the right to refuse the offer of attendance on the course and instead opt for a fixed penalty and points or contest the allegation or the penalty for it in court. The police, on behalf of the State, are simply offering the opportunity to receive a service in the form of an educational course that has been properly evaluated and is believed to offer a benefit. There is bound to be a cost involved in providing that course but that does not mean that, having devised it, the State is obliged to meet that cost. Indeed the provision of free courses, at a cost to the Police authority, might itself be judged an unreasonable use of public money. In deciding to attend a course, the driver is exercising a choice. The cost of the course to the driver is the cost of exercising that choice. The course fee, whether it is paid to the Police as an intermediary or directly to the course provider, is part of the agreement that the driver enters into by accepting the offer to attend a course. This is distinct from the driver paying a fee to avoid a prosecution or other penalty.

Finally, there can be nothing objectionable in building into the course fee an element to cover detection and processing costs, since the basis of the offer must be a belief in evidential integrity and a proper identification of the offender. Provided that levy properly reflects the cost of reaching the point of being able to make the offer it will not be unreasonable. The wider public interest of greater road safety through the retraining of offenders cannot be achieved without this.

The Appellant's position

26. Both in his grounds of appeal and at the oral appeal hearing Mr Hayden made the following points, which are summarised below:

(1) The Commissioner had erred by concluding that the public interest is served by maintaining legal professional privilege (LPP) on the basis that "an effort" had been made to satisfy the public interest in the disclosure of the "comprehensive summary". That summary did not

describe the law in sufficient detail to allow a member of the public to conclude that there were no doubts about the law.

(2) One case relied on as giving authority to the police to devise a "constructive and pragmatic' response when dealing with offenders was *R v Durham Constabulary* 2005. The impression given was that the effect of the case allowed a wide range of responses but - when taken in context- it only referred to warnings and cautions and only related to warnings and reprimands given to young offenders under the Crime and Disorder Act 1998. It did not consider the common law regarding speed awareness courses either directly, because cautions were not permitted under the scheme.

(3) *Associated Picture Houses v Wednesbury Corporation* 1948 was about licensing justices and whether they had a statutory power to impose conditions as they saw fit to do so under the Sunday Entertainments Act of 1932. The test was whether or not those conditions were reasonable. It was only if there is a law which gives the police the discretion to impose conditions that the test of reasonableness could be applied. Without a law, and there is none, no conditions can be imposed. He could not see how that case was relevant to his request.

(4) Offending drivers had to pay a course fee and that the speed awareness courses were being used by the police to make a profit. The accounts for Wales showed – for instance - that each course made a profit of thirty-five pounds (£35) for each of 75,704 drivers.

(5) Other matters which were relevant to the public interest issue and which also added to it were:

- The existence of the rule of law and the fact that Parliament had not enacted any law which made the police policy lawful, on the basis that no one could be punished or made to suffer any penalty except for a distinct breach of established law. It was in

the public interest to be sure that the Home Office and the police were not just making up laws.

- The fee for the attendance at a speed awareness course was an inducement to avoid the lawful imposition of driving licence points by accepting a fixed penalty. If a motorist was told to pay £60 for the course and £35 to the police he would conclude that the latter was a bribe. If, on paying £95, he found out that the true cost of the course was only £60 he would feel cheated. It was in the public interest to be sure that chief constables were not breaking the law and that could only be achieved by being told the nature of the law that permitted this.

- The public expected that police officers would know their police powers. A speeding motorist, told that the alternative to a statutory fixed penalty was paying for and attending a speed awareness course, needed to know the legal basis for the officer's action. As the legal advice had not been published, police officers were acting in ignorance of the law. It was in the public interest that police officers knew that they were acting within their powers. The public were entitled to satisfy themselves that there were no laws so secret that even the police officers who exercised the powers from them knew what was and was not lawful.

- It was wrong to have a secret law.

27. He also relied on the cases of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* (EA/2007/0052) and *R (ex parte Attfield) v London Borough of Barnet* [2013] EWHC 2089.

The question for the Tribunal

28. Did the public interest in maintaining legal professional privilege in the factual circumstances of this appeal outweigh the public interest in revealing the requested information?

Evidence

29. The Tribunal had disclosed to it - as closed, confidential material - the withheld information.

30. It has been able, therefore, to consider the public interest balancing exercise involved in this appeal in the fullest possible context.

31. The Tribunal - when it sees such closed, confidential material in circumstances where it cannot immediately be made available to the Appellant - adopts a rigorous approach to considering the public interest arguments in revealing the information as against maintaining the exemption.

Conclusion and remedy

32. The Tribunal finds that s.42 is engaged – for the reasons set out in the decision notice – and that the public interest in disclosure is reduced by the public availability of some background and explanation as to the legal basis for NDORS.

33. The Tribunal noted that the "comprehensive summary" disclosed in June 2012 was copyrighted to ACPO. This suggested to us that it may have been circulated or published in some way. The extent of its circulation and its availability to the public who might wish to check the position was not clear to the Appellant. Neither was it clear to the Tribunal. Greater clarity about circulation and availability of the summary at the time of the request and at review may have helped to reassure the appellant in relation to his concerns around the transparency of the basis for NDORS.

34. However the “comprehensive summary” was disclosed to the Appellant and, in doing that, it was disclosed to the public at large.

35. Mr Hayden believes that other information should be made available so that whatever is within the “comprehensive summary” document can be read against the precise legal advice that was given and which is being withheld by virtue of the legal professional privilege claimed in respect of it.

36. What seems to concern him most, within all of this, is the operation of common law as the jurisprudential basis for NDORS.

37. Yet that is comprehensively and accurately explained in the “comprehensive summary” in this way:

> The common law has long acknowledged that in dealing with those believed to be offenders, the police can devise a "constructive and pragmatic" response which has included verbal "warnings" and simple "cautions"….Legislation has built upon this discretion adding formal cautions and latterly conditional cautions to this list of out of court disposals *but the power to offer courses remains rooted in the common law rather than being based upon statute* [emphasis added]. The exercise of this discretion therefore rests, as in all such cases, with (a) there being, in the belief of those offering the disposal, sufficient evidence that an offence has been committed and that the offender is the person who committed it (b) an acceptance by the offender that he or she committed the offence (c) the offence being sufficiently minor, and the offenders record of similar behaviour sufficiently small, that the public interest does not require a prosecution. In the case of the offer of a retraining course, there must then be a reasonable belief that the course will be of sufficient benefit that it will be in the public interest to offer it.

38. Given the nature of the “comprehensive summary” – and looking at the detail of the withheld information in the same way that the Commissioner was able to do – the Tribunal is satisfied that the public interest in maintaining legal professional privilege is properly claimed and met.

39. In this area the relationship between legal advisor and client is based on the confidentiality of any exchanges which allows the client to provide complete and honest instructions and also allows the legal advisor to provide full and accurate legal advice. That full and accurate legal advice

will often necessitate a discussion of any weaknesses of any interpretations or proposed actions.

40. Because the legal advice is comprehensive, covering both strengths and weaknesses, that may – sometimes – be present, a strong public interest in disclosing that advice in order to promote public debate and/or challenges to any actions being taken by public servants in reliance on that advice does exist.

41. It would, however, be wrong for clients to provide less than complete and honest instructions to their legal advisors when they sought advice. That would not be in the public interest as it would be likely to lead to a reduction in the quality and usefulness of the resulting legal advice. Legal advisors might adjust the nature and content of their legal advice if they felt that their advices were to be disclosed to the world at large.

42. In short, the Tribunal finds that – for all these reasons – the public interest in maintaining the legal professional privilege in the withheld information it has seen outweighs the public interest in its disclosure.

43. Our decision is unanimous.

44. There is no order as to costs.

Robin Callender Smith

Judge

5 November 2013