



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2015/0081

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50554893
Dated: 9 March 2015**

Appellant: Adam Roberts

Respondent: The Information Commissioner

2nd Respondent: Government Legal Department

Heard on the papers: Fox Court, London

Date of Hearing: 21 July 2015

Before

Chris Hughes

Judge

and

Henry Fitzhugh and Michael Jones

Tribunal Members

Date of Decision: 26 July 2015

Date of Promulgation: 29 July 2015

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision of the Commissioner on the grounds set out below and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings (“Mr Roberts”) wrote to the Treasury Solicitor’s Department (“TSol” – its name became the Government Legal Department “GLD” with effect from 1 April 2015) on 25 March 2014:-

‘The Treasury Solicitor’s Department provides services to other public authorities in Freedom of Information cases which have been appealed to the Information Commissioner or have progressed beyond that stage. I expect that the Department keeps a body of guidance and ‘lines to take’ on which staff and counsel working on those cases can draw.

I would like to request a copy of the body of resources that are not publicly available which are made available to staff or counsel working on Freedom of Information cases.’

2. TSol responded confirming that it held relevant information but declined to disclose it claiming exemptions under section 42(1) (legal professional privilege) and 31(1)(c) (law enforcement – administration of justice). On review TSol identified further information that had been considered previously:-

“I have established that Treasury Solicitor’s Department does hold information falling within the scope of your request that is not held on the secure intranet site. The information was not taken into account in the original response to your request. I am sorry that the original response was not as thorough as it should have been”

3. The author of the letter then considered the information and relying on the same exemptions as before concluded that the information should not be disclosed.

The complaint to the Information Commissioner

4. Mr Roberts complained to the First Respondent (“the Commissioner”) who investigated. A document entitled “FOI Litigation: A Strategy” was considered. The Commissioner considered the exemptions identified by TSol and concluded that the document should be redacted to remove information protected by section 31(1)(c) (where he found the exemption engaged and the public interest favoured non-disclosure) and the balance of the document released. With respect to the information not covered by section 31(1)(c) he did not consider that it was protected by section 42(1) – legal privilege since the provenance of the information in the document was unclear to him and in any event it merely set out a description of the legal process or operational issues.

The appeal to the Tribunal

5. Mr Adams appealed. He argued that section 31(1)(c) was not engaged, It was the duty of a public body holding information was to act judicially and not as an adversary. Making applicants in FOIA cases more aware of the arguments which might be made makes it easier for applicants to understand the law, make well-informed arguments for disclosure and so make justice more likely.
6. If the exemption were engaged then disclosure would be in the public interest since it would go to redress the imbalance in favour of the public authority.
7. The Commissioner resisted the appeal relying on his decision notice. With respect to the engagement of the exemption he noted that the administration of justice would be prejudiced if one party to the proceedings was at a disadvantage. In this case the prejudice would be caused by the knowledge of the litigation strategy, views on strategic objectives in litigation, relative importance of different arguments and circumstances where concessions could be considered being in the hands of the individual challenging TSol’s position before the Commissioner or Tribunal.
8. In carrying out the balancing exercise weighing competing public interests he reaffirmed his view that (DN paragraph 25):

“the arguments in favour of maintaining the exemption attract additional notable weight in the circumstances of this case given that disclosure risks undermining the government’s position in all future FOI cases..”

9. GLD supported the arguments advanced by the Commissioner noting that:

“As a matter of common sense, disclosure of that information would seriously prejudice government departments in FOIA litigation, because it would enable opposing parties to anticipate the Government’s strategy; assess where they might be able to wring concessions from government; and be aware of Government’s own view of the strength of its position on key legal issues.”

10. GLD further emphasised the right of a public body to defend its decisions, indicating that the appellant had conflated the role of a public body in taking the initial FOIA decision with its subsequent steps defending its decision.

11. In weighing the public interest GLD argued that sharing a litigation strategy would undermine the strategy, undermine the adversarial system, undermine the Government’s position in all cases before the Tribunal, it would be unfair to require disclosure of its strategy simply because it had experienced representation, it would have a chilling effect on the ability of public authorities in seeking advice from their lawyers. In any event there are extensive sources of information for applicants to the Tribunal which is experienced in ensuring unrepresented parties are not prejudiced.

12. GLD also maintained its position that the withheld material was legally privileged and should not be disclosed.

13. Mr Roberts re-affirmed his view that the administration of justice was distinct from GLD being disadvantaged, affirmed the disparity in resources and that disclosure would not create the holes that are in the strategy, disclosure might reveal where the Government’s line was weak and it was conducive to justice to know where the weaknesses were. He acknowledged that some material might be subject to legal privilege but argued that public interest would continue to favour disclosure.

Witness Evidence

14. Two witness statements were submitted by GLD. In 2007 H Nowell-Smith was a senior lawyer in the Ministry of Justice advising the Access to Information Central

Clearing House which had been set up to ensure a co-ordinated approach to FOI litigation across Government. In 2007 she was involved in the preparation of the document, writing parts of it and drafting the annex summarising advice which had been given on FOI. She stated that the annex was used as a way of handing information about the early cases under FOI, communicating the information to lawyers across Government and ensuring consistency of approach in legal arguments to the Commissioner and the Tribunal.

15. O Lendrum is a civil servant in the Information and Devolution Policy Division of the Ministry of Justice with responsibility for the development and implementation of Government policy on FOIA. His evidence dealt with the background to the document. The FOI Clearing House existed from 2005 to 2012. The information was to help ensure co-ordination and consistency across Government. The Clearing House was disbanded in early 2012 and the document is no longer widely used by government departments, it is no longer disseminated or promoted by MoJ. He stated:-

“The redacted elements of the subject information continue to reflect current practice in respect of FOI litigation and our position in relation to achieving specific outcomes in litigation... It places particular emphasis on these subjects and provides details of the tactics which are still employed in seeking to establish favourable case law in these areas. The disclosure of such tactics and commentary on key issues would continue to harm the Government’s ability to strive to meet its litigation aims by providing those appealing against public authorities’ decisions with a distinct tactical advantage... In my view the litmus test in this context is whether, in current or future litigation, the advice we would give another department which asked for a line to take or assistance on procedure would be identical in substance to the material contained in the subject information. It is my firm belief that it would. That is the measure of the prejudice and the public interest that would be attached to it.”

Consideration

16. The tribunal is satisfied that the exemption in section 31(1)(c) is engaged. The disclosure would prejudice the administration of justice. The prejudice which would arise is that it would hamper one set of parties (government departments) to

proceedings before the Information Commissioner or the GRC by disclosing the legal analysis underpinning the stance they take and the strategic considerations which may affect the approach to individual cases. This would clearly give those seeking information from the Government an advantage and it would make it harder for those departments to argue their cases most effectively. Real prejudice would arise and the disclosure would create a persistent disadvantage.

17. While Mr Roberts has argued that there is a duty on public bodies to act fairly and judicially in dealing with requests for information and should seek to apply the law; he has elided the issues. When considering a request and at review a public body has a duty to weigh the request, consider applicable law and where appropriate weigh the consequences of alternate decisions in order to determine the public interest. If, after the review stage it has concluded that there is a public interest in withholding the information then, in proceedings before the Commissioner, the Tribunals and the Courts, it has a duty to protect the public interest it has identified. This does not mean that it no longer acts fairly, but it is under an obligation to strive to demonstrate why the public interest is not as it is suggested by the person making the request. In so doing it is inevitable that government will seek to develop a strategy to do this effectively, it is its responsibility to ensure that, where it has identified a public interest in the non-disclosure of information, it advances this view effectively. It is then the responsibility of the Commissioner, and subsequently the Tribunal, to objectively consider these arguments as part of the formulation of a decision.
18. In considering where the public interest lay the Tribunal noted the weight the Commissioner gave to the public interest in disclosure of how the Government makes decisions in relation to requests under FOIA (DN paragraph 24), however he concluded that the balance lay in non-disclosure. The evidence of Mr Lendrum (which the Tribunal accepted) clearly showed the continuing importance of the material as continuing to reflect legal strategy. As the Commissioner found (DN paragraph 16) *“This is because provision of such information could ..plausibly provide an advantage to the government’s opponents in any FOI litigation. For example, as TSol highlighted, it could make opponents aware of particular points which the government might concede in certain cases.”*
19. The Tribunal considers that the very considerable weight of this prejudice is determinative of the issue and the proper administration of justice would be harmed

by the disclosure. The Tribunal also notes that, given the evidence of the lawyer responsible for much of the drafting, section 42(1) could properly be claimed for much if not all of the withheld material. The Tribunal has also considered the scope of the redactions made and whether any further material could properly be disclosed. It is satisfied that no further meaningful disclosure of information could be made.

20. The Tribunal is therefore satisfied that the analysis of the consequences of the disclosure of the disputed information carried out by the Commissioner is correct in law and dismisses the appeal.
21. The Tribunal also noted the history of the request and how it was handled by TSol. The request is very clear; having set out the background and the assumption upon which the request is made it goes on to ask for “a copy of the body of resources that are not publicly available which are made available to staff or counsel working on Freedom of Information cases”.
22. The document **FOI Litigation: A Strategy** states in its first line: “*The Freedom of Information Act has now entered its third year of operation.*” That sets its production in 2007. This is confirmed in the text and by the evidence of the lawyer who played a key role in drafting it. It starts by reviewing the state of play in terms of number of requests, in the annex at the end there is a discussion of the various lines to take on issues and the cases where the issues have been explored. It was created at a time when there were relatively few decided cases and these were cases before the Information Tribunal. That tribunal ceased to exist five years ago. The unit which commissioned the document was wound up over three years ago. In the five years from its production until the winding up of the unit there was no revision of the document to keep it up to date with the evolving case law relating to FOIA despite the many key decisions and controversies around FOIA during that period. On the face of the document a key part of it, the legal analysis of case law, was not updated. It would have looked stale and out of date within a year or two. If the document had been kept up to date there would have been a series of revisions to ensure that it gave useful guidance on the law. There were not. All the evidence points to the conclusion that well before the winding up of the body which had commissioned it the document was not in circulation.

23. The request was made in 2014 it asked for “resources ... which are made available”. By that date the evidence demonstrates that at that stage it was not made available; it was obsolete and had been for some years. The document was not in scope. The document under review was held by TSol but it was not made available to government lawyers by the Government secure intranet (which appears to be the normal method of dissemination) as the letter giving details of the review noted (bundle pages 48 -51). The Tribunal is therefore satisfied that at the date of the request, the document which is the subject of these proceedings was not within the scope of the request, despite the view taken by TSol at review stage which treated it as though it were.

24. For the reasons stated above we dismiss the appeal. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 26 July 2015