

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0152

Before

Judge

David Farrer Q.C.

Tribunal Members

Andrew Whetnall

and

Roger Creedon

Between

Richard Gillingham

Appellant

and

The Information Commissioner ("The ICO")

Respondent

The appeal was determined on written submissions

Decision and Reasons

The Tribunal finds that the Decision Notice (“the DN”) correctly upheld the London Borough of Croydon’s (“LBC”s”) reliance on the exemptions provided by sections 36, 41 and 42 of the Freedom of Information Act, 2000 (“FOIA”) but not s.43(2). This appeal is therefore dismissed. LBC is not required to take any further steps.

The FOIA provisions relevant to this appeal.

S.36 (1) This section applies to -

(b) information which is held by any other (than central government) authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

- - - -

(b) would or would be likely to inhibit -

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation - -

(5) In subsections (2) and (3) “qualified person” -

- - - -

(o) in relation to information held by any public authority not falling within paragraphs (a) to (n), means -

- - - -

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

S.41 (1) Information is exempt information if -

(a) it was obtained by the public authority from any other person - - - - and

(b) the disclosure of this information to the public (otherwise than under this

Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

S.42 (1) Information in respect of which a claim to legal professional privilege - - - could be maintained in legal proceedings is exempt information.

S.43 - - -

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

The Background

1. LBC, like a substantial number of other local authorities, retained a company of specialist solicitors (BS) to present its case to Special Educational Needs (“SEN”) tribunals, to which parents appeal adverse decisions as to the provision of expert support to their children.
2. Early in June, 2016, the BS solicitor who conducted such appeals for LBC and those other authorities, issued a number of grossly insensitive tweets, apparently mocking parents who had lost appeals in which he represented local authorities.
3. The text of these tweets spread rapidly via social media among parents involved in SEN appeals and in the national and local papers. LBC learned of them on 13th. June, 2016 and received an Email from him the next day, acknowledging what he had done.
4. LBC was immediately faced with very difficult decisions, which had to be reached as rapidly as proper reflection and appropriate consultation permitted. Whilst all concerned at LBC no doubt deplored such offensive conduct directed at families burdened with most distressing problems, they needed to consider how to handle the problem of representation on imminent SEN appeals and the substantial financial issues involved in any decision to sever contractual relations with BS.

These included not only the costs of instructing fresh solicitors but the prospect of losing appeals due to less effective representation, resulting in long – term funding commitments. They needed to sound out the views of officers and members of the council as well as consulting parental and other interest groups concerned with SEN issues.

5. Given the sensitivity of the subject matter, it was likely that contrasting views would be held within LBC as to the right way forward. If possible, LBC would want to reconcile them. It would also wish to consult other local authorities, which instructed BS, as to what they intended to do.
6. On 15th. June, 2016, The Leader of LBC announced its decision to suspend immediately any work with BS pending review. That evidently provoked vigorous responses from members of the public and calls to terminate the retainer.

The Request, the Response of LBC and the DN

7. On 16th. July, 2016, Mr. Gillingham wrote to LBC. Having referred to the media coverage of the BS tweets and the suspension of work with BS, he made the following request
“ I request disclosure of all information held by the Legal, Contracts and Leader’s Office departments concerning this review and the use of (BS) by (LBC).”
8. LBC responded on 9th. August, 2016, confirming that it held information within the scope of the request but refusing to disclose it. It invoked the exemption in FOIA s. 36(2)(b)(i) and (ii). (Prejudice to the conduct of public affairs). Following an internal review it further relied on ss. 41 (Information provided in confidence) and 42 (Legal Professional Privilege) as exemptions applicable to some of the withheld information. In the course of the ICO’s investigation LBC indicated reliance on s.43(2) (Prejudice to commercial interests) in respect of one document.
9. Mr. Gillingham complained to the ICO.

10. In the course of her investigation, LBC set out its case as to each of the claimed exemptions in an email of 3rd. May, 2017, which included the opinion of the Qualified Person (“the QP”), dated 4th. August, 2016, required by s. 36. The QP was Acting Council Solicitor and Acting Monitoring Officer. It is not disputed that she was a “qualified person” pursuant to s.36(5). As Head of Social Care and Education Law she had been closely involved in LBC’s handling of the BS issue. The open bundle contained a redacted and the closed an unredacted version of those documents. They set out the essentials of the ICO’s case on appeal.

11. The DN set out in detail the requirements for engagement of the exemptions relied on and, save as to s.41, an absolute exemption, the competing public interests in disclosing and withholding the requested information. It concluded that s.36(2)(b)(i) and (ii) were engaged in respect of all the withheld information on the basis that the QP’s opinion as to the likely effect of disclosure was reasonable and that the public interest favoured withholding it. The ICO found that s.41 was engaged as regards material received from a third party but not documents created by LBC. Sections 42 and 43(2) were engaged in respect of a very limited number of documents and, again, the public interest in maintaining those exemptions prevailed.

The Grounds of Appeal and Submissions in response.

12. Mr. Gillingham appealed. His Grounds of Appeal, as elaborated in accordance with the Registrar’s direction, may be summarised as follows -
 - (i) As to s.36(2)(b)(i) and (ii), that the QP had been engaged in the handling of the BS issue amounted to a breach of natural justice. (Hence, presumably, her opinion could not be reasonable.) Disclosure of the information was not likely to be prejudicial to free and frank advice or discussion. Mr. Gillingham relied on his own experience as a senior civil servant giving advice to ministers. The “chilling effect” of disclosure was grossly exaggerated by public authorities in such cases as this. Anonymity could mitigate any risk of prejudice to the quality of debate within the authority. Alternatively, if s.36 was engaged, the

public interest in disclosure in a case of such sensitivity, involving unlawful conduct and breaches of human rights, outweighed the argument for withholding this information. The Leader of LBC had commented publicly on this issue and disclosure was essential to a proper assessment of the value of his pronouncements. Transparency as to policy - making can improve the quality of policy - making. Disclosure may expose wrongdoing by LBC or BS or, on the other hand, demonstrate that such misconduct has been remedied.

- (ii) As to s.41, Mr. Gillingham questioned whether BS should be regarded as a party independent of LBC. He referred to the public interest but s.41 enacts an absolute exemption.
- (iii) As to s.42, he questioned whether it could be engaged in respect of a request for advice on "options" but argued that the public interest required disclosure, if it did.
- (iv) As to s.43(2), he submitted that the late reliance by LBC on this exemption amounted to an abuse of process and that there was no evidence of prejudice to a third party. He repeated the point about BS being under contract and subject to instructions from LBC. If the exemption was engaged, the public interest was in disclosure.

13. The ICO responded to these grounds in a comprehensive series of submissions, most of which are reflected in the following sections of this decision.

The Findings of the Tribunal

14. LBC invoked s.36(2)(b) in respect of all the withheld information. Mr. Gillingham rightly submits that the Tribunal must examine each document individually when assessing this claim. Nevertheless, it is necessary to keep in mind the body of information as a whole and the situation at the time of the request, when doing so.

15. The engagement of s.36(2) requires "the reasonable opinion of a qualified person" that one or both of the results specified in paragraph (b) "would or would be likely to" result from disclosure. The QP in this case adopted the latter alternative.

16. The QP does not occupy a quasi - judicial role when delivering the opinion relied on, although she must have regard to arguments on both sides when deciding whether disclosure would be likely to inhibit free and frank advice or discussion on this or later occasions. The opinion is likely to be better informed where, as here, the QP has been tackling the issue herself. Certainly, no question of a breach of natural justice arises in these circumstances.

17. It is beyond argument that the question whether the opinion is reasonable is quite distinct from the question whether the Tribunal agrees with it. Just as with judicial review of the decisions of a public authority, it suffices that the opinion is within the range of opinions which a rational person could hold. Here the QP took account of the state of deliberations within LBC when the request was made on 16th. July, 2016, almost exactly a month after the BS issue arose. This was not a case where the potential inhibition was simply to future advice and debate. It is clear from the withheld documents that, as at 16th. July 2016, LBC's future relationship with BS was under close consideration by members and officials and steps were being taken to protect LBC's interests in the immediate future. The legitimate and powerful public interest in what LBC was doing was acknowledged but so was the need for deliberation free from the immediate stress of the public searchlight. This was clearly a reasonable opinion.

18. We find that the public interest in withholding the requested information outweighed the interest in disclosure. The electorate was alerted on 15th. June, 2016 to LBC's suspension of BS pending a full review of the position. No further decision had been taken by 16th. July. Of course, there is always a strong public interest in transparency as regards the transactions of a local authority to promote trust and democratic accountability. There was a significant public interest here in knowing how LBC intended to balance the practical problems arising from these unpleasant tweets with an appropriate reaction to the widespread revulsion at such disgraceful insensitivity by its solicitors. There is a strong public interest in prompt disclosure of decisions taken by a local authority and the reasons for those decisions, where sensitive issues of this kind are involved. However, the precise content of discussions, arguments and negotiations, which precede such decisions, as recorded

in Emails, and the formulation of the reasons for them, will generally be of less consequence. Of course, that will not be true if they reveal improper conduct – for example a scheme to mislead the public on some aspect of the affair. That is not the case here. No “wrongdoing” would be exposed.

19. On the other hand, a sensible debate and a calm appraisal of the problems involved are inevitably more difficult if every option or undigested proposal, every request for advice is exposed to public scrutiny, whilst the outcome of the debate is in the balance. This is not just another case about the “chilling effect” on future candour; it relates more immediately to the effects on decision – making taking place at the date of the request.
20. The announcement by the LBC Leader merely informed the public of the suspension of BS’s contract, and of the review and denounced the offensive tweets. A fair assessment of what he said did not require disclosure of records of internal discussions.
21. We find, therefore, that s. 36(2)(b) is engaged in respect of the Email exchanges to which that exemption is applied in the Closed Bundle Index and that the public interest in maintaining that exemption is greater than the interest in disclosure. We find that both subparagraphs (i) and (ii) are engaged and make no attempt to distinguish between them in their application to the withheld information.
22. Section 41 is invoked only in respect of a small number of documents. Of those identified in the Closed Bundle Index as covered by s.41, pp. 18 – 25 and 41 – 44, save for an Email from BS at 42 , are not information obtained from another person and cannot therefore be exempted by virtue of s.41.
23. The rest are communications from BS, which is clearly “any other person” despite its contractual links with LBC. They are not expressly sent in confidence but it is fair to infer that BS assumed that they would be treated as confidential, having regard to the circumstances in which they were sent. The information they contain, which includes the steps BS intends to take to deal with the issue, is probably confidential

in nature, given the commercial interests involved. Its disclosure could damage the interests of BS.

24. Whether a breach of confidence would be actionable depends further on whether LBC could show a public interest in disclosure. We have already acknowledged the general value of transparency in relation to the conduct of the affairs of a local authority. We agree with the ICO, however, that the value to the public of disclosure of the BS Emails in the context of the information otherwise in the public domain, is very slight. On balance, we consider that a public interest defence to an action for breach of confidence would probably fail.
25. Accordingly, we find that the three requirements for an actionable breach of confidence set out in *Coco v A,N. Clark(Engineering) Ltd. [1968] FSR 415* are, on balance, met so that the s.41 exemption applies to the information identified in §§22 and 23.
26. Section 42 is relied on only in relation to one Email (CB 20, 21) from an in – house solicitor to other LBC officers engaged in the BS problem in which she provided advice as to dealing with BS. It is clearly privileged legal advice. There is no compelling public interest in overriding the strong policy argument for preserving that privilege. The public would learn little or nothing to further its understanding of LBC’s stance in relation to BS.
27. LBC was entitled to raise s.43(2) when it did. It could have done so for the first time in response to the appeal. [see *Birkett v DEFRA [2011] EWCA Civ 1606*]. There was no abuse of process. The ICO dealt with the claim in the DN. This exemption relates only to a letter from LBC to BS dated 21st. June, 2016. BS claims that it gives a false impression of BS and is damaging to its commercial interests (see OB p.88). LBC asserts that disclosure of such material may prejudice its own commercial interests by discouraging outside contractors to provide services because of the risk that such material would be made public.

28. The Tribunal doubts that disclosure would cause any further damage to BS beyond what it has already suffered. Prejudice to LBC's commercial interests seems fairly speculative also. We do not consider that s.43(2) is engaged. The relevant document falls, of course, within our finding as to s.36(2)(b).

29. For these reasons we dismiss this appeal.

30. This is a unanimous decision.

Signed

David Farrer QC,

Judge of the First-tier Tribunal

Date: 21st.. February, 2018