



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0162

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50357316
Dated: 30 June 2011**

Appellant: Kristin Heimark
Respondent: Information Commissioner
Second Respondent: London Borough of Hackney
On the papers: 28 October 2011
Date of decision: 26 November 2011

Before

Robin Callender Smith
Judge

and

Suzanne Cosgrave and Malcolm Clarke
Tribunal Members

Written Representations:

Appellant: Ms Kristin Heimark
Respondent: Ms Michele Voznick
Second Respondent: Mr Timothy Pitt-Payne QC

Subject matter:

FOIA 2000

- Legal professional privilege s.42

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 30 June 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Prior to elections that took place in May 2010, a Mayoral candidate contacted the London Borough of Hackney (LBH) call centre and recorded the conversation which then ensued. The "Hackney Citizen", a local newspaper, posted the audio recording of the conversation on its website on 4 May 2010.
2. On 6 May 2010 the LBH legal department wrote to the Editor of the "Hackney Citizen" requesting that the audio recording be removed from the website. Failing that the LBH warned it would seek an injunction against the newspaper.
3. In subsequent exchanges with other parties about the LBH's letter to the "Hackney Citizen", LBH indicated it had received external legal advice that supported its own legal opinion in respect of what had happened.

The request for information

4. On 11 July 2010 the Appellant sent a letter to LBH containing five requests for information. That letter stated:

".... and with specific regard to the matter of the Council's 6 May 2010 injunction threat, please provide all of the following information:

- (1) Please confirm whether or not an external solicitor was instructed to give advice to the Council on the audio recordings and the date of those instructions (if any);*
- (2) Please provide the external instructed solicitors name and firm;*
- (3) Please provide the date any such advice was received by the Council;*
- (4) Please indicate the fee paid (if any) by the Council before the external solicitor's advice; and*
- (5) Please provide a copy of the said external solicitor's advice (if any)."*

5. On 17 August 2010 LBH disclosed the information for requests 1, 2 and 4, providing a vague response to request 3. For request 5, LBH stated the information was held but that it was exempt from disclosure under s. 42 (1) FOIA and that the public interest favoured maintaining the exemption.
6. On 24 August 2010 the Appellant requested an internal review of the responses for requests 3 and 5. That produced information for request 3 but the review upheld the decision to withhold information in respect of request 5.

The complaint to the Information Commissioner

7. The Appellant complained to the Information Commissioner (IC) on 24 October 2010, focusing on the withheld legal advice for request 5. The IC was specifically asked to consider:
 - (a) That the legal advice should be provided to the public.

- (b) Whether the person who conducted the internal review might have a conflict-of-interest as the disputed information concerned their potential actions.
 - (c) Whether disclosure of the legal advice would illustrate whether there were any misrepresentations by LBH.
 - (d) Whether there was serious factors that favoured the public interest in disclosure in a situation where a public authority tried to chill freedom of expression.
 - (e) Other arguments about the operation of the exemption on the facts of the case.
8. The IC asked LBH for a copy of the withheld information on 9 December 2010 and that was supplied on 14 January 2011. On 4 April 2011 the IC provided a detailed update to the Appellant and explained the scope of his investigation. On 8 April 2011 the IC made detailed further enquiries of LBH and received a response on 27 May 2011.
9. Having viewed the information in question the IC concluded that it was subject to legal professional privilege and that the exemption under s.42 (1) FOIA was engaged.
10. In the Decision Notice, at Paragraph 26, he stated his view was that the advice had not lost its confidentiality and was privileged. He noted that the circumstances related to "advice privilege". At Paragraph 27 he stated he was satisfied that the information that had been provided to the public about the matter did not falsely represent the withheld information. He was satisfied that the confidentiality of the advice remained and that the exemption was engaged.

11. LBH had explained that disclosure of the legal advice would be likely to have a significant prejudice to its ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance that could be placed on the advice which had been fully considered and presented without fear or favour.
12. The IC considered the Appellant's contention that the time for LBH to acquire an injunction had long passed. The IC understood that LBH could still have undertaken litigation in certain circumstances at the date of the request and did not believe that argument reduced the weight of the public interest factors.
13. The Appellant had pointed to a blog where a spokesman apparently said that the case was closed from LBH's point of view. The IC had discussed that with LBH who took the position that it regarded the advice as being live at the date of the request because there was still a possibility of litigation being necessary. The IC believed that added some further weight to the public interest factors favouring maintaining the exemption.
14. The IC had also considered the potential adverse effect on the media in terms of Article 10 ECHR freedom of speech issues. He accepted that there was a real public debate about the effect of injunctions on the freedom of speech and that accountability was important when the public authority decided it was appropriate to consider litigation about something that had been said about it.
15. On balance he concluded that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. He had also considered whether it would be possible for some parts of the withheld information to be provided without the exemption being engaged but had concluded that the exemption applied to the whole of the withheld information.

The appeal to the Tribunal

16. The Appellant points out in her appeal to the Tribunal that the test for litigation privilege was whether the dominant purpose of the communication was obtaining legal advice in relation to actual or contemplated litigation. Contemplated litigation was defined as litigation being "reasonably in prospect". Because the requested information was covered by legal advice privilege that indicated that LBH and the IC accepted the litigation threat was never reasonably in prospect.
17. Any pressing need for litigation evaporated when the "Hackney Citizen" published a letter from its interim Head of LBH's Legal Services on 6 May 2010. That made it obvious that there was no foundation in law for that threat.
18. Because there was no potential harm to the privilege holder at the date of the request and the litigation injunction threat was without foundation then, while the disclosure of the advice might have caused embarrassment, it would not have "harmed" LBH's case or caused "significant prejudice to its ability to defend its legal interests".

Evidence

19. The Tribunal has had the opportunity of considering the withheld information in the context of this appeal.

Conclusion and remedy

20. The background circumstances of this case involved LBH seeking to use its best endeavours as an employer to protect a staff member from

public identification in relation to a simple error she had made on a subject which in no way formed part of her duties or responsibilities.

21. The staff member had been dealing with an out-of-office-hours call by someone wanting, for whatever reason, to make the call anonymously. LBH accepted that incorrect information had been disseminated and made it clear an error had been made by a made of staff. If disclosure of that information had been prevented absolutely then the Article 10 argument might have had greater weight in this appeal than can in fact be the case: LBH had made it clear it had at no point objected to the facts or the content of the conversation being reported in full.

22. The Tribunal has had to consider all the public interest factors in favour and against disclosure and balance the weight of those factors. In the context of legal professional privilege it is accepted by this Tribunal – as others and the High Court (e.g. *DBERR v OBrien, Thornton EA/2009/0071*) that there is a strong element of public interest in built into the exemption and then need to be equally strong countervailing factors for the public interest favoured disclosure. One such weighty factor in favour would be if, as the Appellant asserts, LBH misrepresented the advice it received. On this point the tribunal is divided and, in the interests of transparency, seeks to explain the division without having to resort to the use of a closed annex for the decision.

23. Having regard to the previous Tribunal case (*Thornton EA/2009/0071*) which provided in its summary six principles, "the most obvious cases where the public interest is likely to undermine LPP [are].... Where there are clear indications that it has ignored unequivocal advice which it has obtained.". Two members of the Tribunal did not believe LBH misrepresented or disregarded the legal advice received.

24. Robin Callender Smith and Suzanne Cosgrave believe that the legal advice provided properly covered the issues being faced by LBH, particularly in relation to the possibility of an injunction. Those two members of the Tribunal did not believe there was an attempt by LBH to misrepresent or disregard the legal advice received. They note that in the IC's Decision Notice at Paragraph 53 it is stated that he "does not think its contents had been misrepresented by LBH" and says further "It is noted that legal advice whatever its content consists only of the legal opinion of certain individuals".

25. Malcolm Clarke felt that LBH's claim in its letter to the Appellant dated 13 October 2010 giving the result of the Internal Review - that the external legal advice "endorsed" the advice of the in-house legal team - was a misleading presentation of the position and that, as such, the claim for LPP had been eroded. Had LBH simply declined to make any comment on the content of the external advice, the position, in Malcolm Clarke's view, would have been different.

26. More generally, the advice in question was sought in May 2010 and the Appellant's request was made in July 2010. The Tribunal is satisfied – without a division of opinion - to the required standard (the balance of probabilities), that the request was sufficiently soon after the event that the passage of three months did not mean that the issue was completely closed and could not be resurrected.

27. The Tribunal reminds itself of the statement about the nature of legal professional privilege set out in the case of *Bellamy v IC and the Department of Trade and Industry* (EA/2005/0023):

"..... 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, her or its lawyers, as well as exchanges which contain or a refer to legal advice which might be

imparted to the client, and even exchanges between the client and (third) parties if such....come into being for the purpose of preparing the litigation.”

28. In all the circumstances of this case – applying the test in s.2 (2) (b) FOIA - the majority of the Tribunal is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

24. Our decision is by a majority.

25. There is no order as to costs

Robin Callender Smith

Judge

29 November 2011