



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights**

Appeal Reference: EA/2017/0024

**Decided at Field House
On 5 September 2017
Without a Hearing**

Before

**JUDGE PETER LANE
DR HENRY FITZHUGH
PIETER DE WAAL**

Between

THE CABINET OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

FAISAL QURESHI

Second Respondent

DECISION AND REASONS

1. The appellant appeals against the decision of the first respondent on 12 January 2017, whereby she required the appellant to disclose certain information, consequent upon the second respondent's request of 18 April 2015 to see "documents relating to the investigation on closure of the Bank of Credit & Commerce International during the period of 1991". Having been supplied by the appellant with a copy of the Bingham Report into the supervision of BCCI, the second respondent replied that he already had a copy and that he would "be interested in minutes of Cabinet meetings and correspondence where the matter was discussed".
2. The appellant contacted the second respondent on 9 June 2015 and explained that it considered section 35(1)(a) and (b) of the Freedom of Information Act 2000 applied to his request but that it nevertheless needed more time to consider the balance of the public interest.
3. On 4 August 2015, the appellant provided the second respondent with a substantive response. As to the request for minutes of Cabinet meetings, the appellant refused to confirm or deny whether this information was held, relying on section 35(3) of FOIA. Regarding the request for correspondence on the subject, the appellant confirmed that it held information of that description but considered it exempt from disclosure on the basis of sections 27(1)(a), (c) and (d), 35(1)(a) and (b) and 41(1) of FOIA. By reason of section 23(3), the appellant stated that it could neither confirm nor deny whether any of the requested information was exempt from disclosure on the basis of section 23(1).
4. The first respondent's decision notice of 12 January 2017 required the appellant to provide specified redactions of documents 3, 4, 5, 6, 10, 11, 15, 19, 20, 27 and 36, as identified in the Confidential Annex to the decision. The appellant was also required to provide documents 45, 48, 50 and 56, again, as identified in that Annex.
5. Following the first respondent's decision, a considerable amount of the information requested by the second respondent was disclosed by the appellant. The dispute between the appellant and the first respondent has been narrowed considerably. The first respondent now accepts that documents 3, 4 and 5, as listed in the Confidential Annex, fall within the exemption contained in section 42(2), for what is known as legal advice privilege, and that the balance of the public interest lies in favour of non-disclosure. Insofar as the second respondent takes issue with this position, it is necessary for us to consider the matter ourselves.
6. All the parties were content for the appeal to be decided without a hearing and we are satisfied that we can justly do so. Our decision is unanimous.
7. Having examined documents 3, 4 and 5, we are fully satisfied that they comprise communications passing between a solicitor and her client (or through an

intermediary), concerning the content and presentation of the client's evidence to the Bingham Inquiry. The "Three Rivers" cases¹, establishes that legal advice privilege applies to confidential communications passing between a client and solicitor, whether or not through an intermediary, as well as documents evidencing such communications. This is so, irrespective of whether litigation is contemplated. Furthermore, "Three Rivers" makes it plain that the privilege extends to the content and manner and presentation of a statement to be submitted to the Bingham Inquiry, together with all internal notes and memorandum relating thereto, notwithstanding that the advice sought was not strictly advice and assistance about legal rights or obligations.

8. Even though it may be wrong to describe the exemption for legal advice privilege as having "inherent weight", it is plain that the public policy considerations underlining the privilege are powerful ones. In the present case, notwithstanding the passage of time, we are fully satisfied that the weight in favour of preserving the integrity of client/solicitor communications in these circumstances remains strong, since the disclosure of this information would risk affecting the future behaviour of those seeking and giving advice of this kind.
9. Moreover and in any event, the second respondent is wrong to contend that no relevant litigation was ongoing. At the time that the appellant refused his request, in 2015, an attempt to persuade the Luxembourg Court of Appeal to re-open a judgment in respect of the BCCI issue lay in the future. It was not until the Luxembourg Court of Appeal gave its decision on the matter on 2 March 2016 that it could realistically be said that some 25 years of litigation surrounding BCCI were at an end. The date of refusal is the point of time at which the public interest balance needs to be assessed.
10. Documents 27, 48 and 50 are now agreed by the appellant and the first respondent to be exempt from disclosure because they contain information obtained by the appellant from the third party (not being a government department), the disclosure of which would constitute a breach of confidence actionable by that third party.
11. Having examined these documents for ourselves, we are satisfied that this is correct. Neither the passage of time nor any aspect of the information itself gives rise to a suggestion that disclosure in 2015 would not be actionable. Section 41 is an absolute exemption.
12. The only remaining dispute between the appellant and the first respondent concerns documents 6 and 19. The appellant's case concerning document 6 is that it is the same as or materially similar to parts of document 4, which the first respondent has decided should be redacted on the basis that section 41(1) is engaged.

¹ Three Rivers District Council v Bank of England (No 5) [2003] QB 1556; Three Rivers District Council v Bank of England (No 6) [2005] 1 AC 610

13. Document 6 is, in our view, entirely concerned with advice of the kind found by Three Rivers (5) and (6) to fall within the scope of legal advice privilege. This is true both of the letter and the attachment, which together form document 6. What we have said above regarding documents 3, 4 and 5 applies to document 6. It is exempt from disclosure, applying the public interest balance.
14. The first sentence of document 19 refers to a third person, not being a government department, in terms that make it plain, in our view, that disclosure of the information would constitute an actionable breach of confidence by that person. Accordingly, section 41 (which is an absolute exemption) is engaged. The first sentence of document 19 should, accordingly, be redacted, but the remainder can be disclosed.
15. Finally, we must deal with document 36. The appellant and the first respondent agree that this document relates to the formulation or development of government policy in respect of the collapse of BCCI. In particular, it concerns the provision of assistance to depositors affected by the collapse.
16. Section 35(1)(a) comprises a “qualified” exemption for information held by a government department etc. which relates to the formulation or development of government policy. The issue is whether the balance of the public interest favours maintaining the exemption. The second respondent submits that, at this point in time, the public interest in withholding the information can no longer be regarded as strong.
17. We have carefully considered this matter. In many cases, policies devised in the 1990s may well be regarded as so historic that disclosing information about how they came to be formulated would not adversely impact upon the machinery of government. The collapse of BCCI, however, was a matter of such profound significance as to fall into a different category. As the appellant points out, the litigation in relation to the collapse of BCCI can only recently be said realistically to have come to an end. At the time of the refusal in this case, for the reasons we have given above, matters were still ongoing in Luxembourg. The policy options discussed at the highest levels in the 1990s for mitigating the effect of the collapse of a major bank remain “live” ones, as the financial crisis of the first decade of the 21st century makes plain.
18. In these circumstances, we agree with the appellant that “release of this information might prejudice the ability of the government to undertake frank discussions of policy options in the future and lead to inaccurate and unhelpful speculation about the way that future bank collapses might be managed”.
19. We also accept the appellant’s submission that the public interest in disclosure is lessened by the fact that a very great amount of information about the collapse of BCCI is in the public domain.

20. The Tribunal accordingly agrees with the appellant and the first respondent on the issue of document 36.
21. The appeal is allowed to the extent specified in paragraphs 13 and 14 above.

Date Promulgated:
23 November 2017

Lane J
22 November 2017