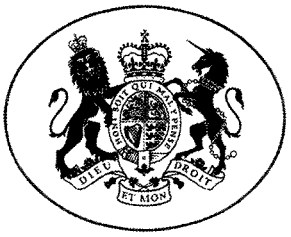

First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Appeal Reference: EA/2017/0043

Heard at The Employment Tribunal, Birmingham.

On 10th. July, 2017

Before

David Farrer Q.C.

Judge

and

Jean Nelson and Michael Hake

Tribunal Members

Between

Alan Matthews

Appellant

and

The Information Commissioner ("The ICO")

Respondent

Representation: Mr. Matthews appeared in person

The Information Commissioner was not represented.

The Tribunal dismisses this appeal. The Government Legal Department is not required to take any action.

Decision and Reasons

1. The Judicial Appointments and Conduct Ombudsman (the JACO") investigates complaints about the appointment, discipline of conduct of judges. It is independent of the Ministry of Justice but has access to the services provided by the Government Legal Department ("the GLD").

2. Mr. Matthews complained to the Judicial Conduct Investigations Office (the "JCIO") about the actions of a judge who refused his application for a judicial review. His complaint was dismissed

3. Mr. Matthews next complained to the JACO about the JCIO decision. The JACO ruled that the JCIO had handled the complaint properly and that there was no basis for a full investigation.

4. Mr. Matthews sought a judicial review of the JACO's handling of his complaint.

5. The Acknowledgement of Service ("the A of S") and the Summary Grounds of Resistance, which were issued by the GLD, wrongly named the Secretary of State for Justice, rather than the JACO as the Defendant to the Judicial Review proceedings.

6. The application for judicial review failed and Mr. Matthews was ordered to pay the costs. He appealed that order on the ground that the A of S had wrongly named the Secretary of State for Justice ("the SSJ") as the Defendant. The Court accepted that the misnomer was a simple error and upheld the order for costs.

7. On 3rd. May, 2016 Mr. Matthews submitted a number of related requests to the GLD including the following, which gives rise to this appeal -

"The TSol (now the GLD) *filed also on 24th. March, 2015, in the High Court regarding Claim No. . . .A document entitled "Summary Grounds of Resistance" (SGR) at whose head the Secretary of State for Justice is identified plainly as the Defendant in the claim. Section 17 of the SGR includes the statement ". . .the Secretary of State respectfully submits that this claim is totally without merit and that permission should be refused . . . "*

Please inform me of the content of the client letter, or other form of approval, which authorized TSol to make the above – quoted submission in Claim No. . . "

8. It might be thought that the appropriate reply from the GLD was that it held no such information as no client had authorised the wrongly attributed submission. However, it responded that it held the requested information but that it was legally privileged, hence protected from disclosure by FOIA s.42(1) and that the public interest favoured withholding it. When Mr. Matthews asked for an internal review, the GLD did not reconsider s.42 but reminded him that it had already stated that the SSJ was named as the Defendant by an error.

9. Mr. Matthews complained to the ICO.

10. When responding to the ICO's investigation, the GLD explained that, in the light of the wording of the request for an internal review, it had concluded that the request was simply an inquiry as to why the A of S had been entered by the SSJ. The answer to that question was through an error and, if that was what was requested, questions of legal professional privilege did not arise. However, the ICO indicated that she did not construe the request for information, taken together with the request for an internal review, in that way but as a request for the content of potentially confidential correspondence. That being so, the GLD reasserted its reliance on s.42.

11. The Decision Notice ("the DN") found that the GLD should have refused to confirm or deny ("NCD") that it held the requested information pursuant to FOIA s.40(5)(a) because it contained Mr.

Matthews' personal data. That could apply only as to the limited elements of the client instructions which involved such data. The ICO, as regulator of data protection, introduced this finding on her own initiative; the GLD had not raised the issue. It was not obliged to NCD the requested information; s.40(5) merely relieved it of the duty of stating whether it held it. Generally, a public authority should be mindful of the requester's interests as a data subject. How significant they were in the context of this request may be debatable. The Tribunal accepts that s.40(5) is relevant but only to the very limited extent of any personal data of Mr. Matthews.

12. As to s.42, the DN found that litigation privilege extended to the requested communication(s) and that the invariably strong public interest in respecting this fundamental privilege outweighed any public interest in disclosure. Mr. Matthews appealed.

13. His grounds of appeal, which were developed in his Reply and extensive oral submissions at the hearing, were lengthy and included criticisms of the GLD and the DN which do not touch upon the issues for our determination. They are, in significant part, based on a rejection of the GLD's claim that the naming of the SSJ was a simple mistake, despite the fact that the Administrative Court and the Court of Appeal considered that the contrary could not reasonably be argued. He is, of course, entitled to argue for such a rejection on this appeal but the Tribunal can properly have regard to the findings of the courts described above.

14. In essence, he submits –

(i) Legal professional privilege ("LPP") does not extend to the communication of instructions of the kind involved here. The sub – species, litigation privilege, which is subject to the existence or imminence of litigation and the sole or predominant purpose test, is limited to the seeking or imparting of legal advice and the obtaining of relevant evidence from the client or third parties.

(ii) If LPP attached to these communications, the public interest in disclosure outweighs the interest in maintaining the exemption because there is a powerful general interest in transparency where government departments are involved in litigation and a particular interest here where the TSol appears to have acted for two clients, a government department and a supposedly independent ombudsman, with incompatible interests.

(iii) The ICO treated him unfairly by failing to inform him of a fundamental change in the GLD's case involving the abandonment and the resurrection of the s.42 exemption.

(iv) She made her findings on the basis of the GLD case at the date of the DN, not as put forward at the time of the internal review and Mr. Matthews' subsequent complaint.

(v) She wrongly had regard to what she judged to be his motivation in making the request.

15. The ICO, in her Response, maintained her stance as explained in the DN.

The reasons for our decision

16. The extent of litigation privilege (as distinct from legal advice privilege) was clearly defined by the House of Lords in *Three Rivers DC v Bank of England (Disclosure) No. 4 [2005] 1 AC 610* . The issue was whether such LPP was restricted to the seeking and obtaining of legal advice. Overruling the Court of Appeal, the House of Lords declared that it extended to communications relating to the presentation of the litigant's case, in *Three Rivers* the most persuasive way of presenting the Bank of England's case on the facts and the law.

17. That is not the function of an A of S but an A of S is an integral part of the presentation of a litigant's case as are the client's instructions for such a step to be taken. The broad reach of litigation LPP is clearly put in the speech of Lord Rogers of Earlsferry:

"52 Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations. In the words of

Justice Jackson in Hickman v Taylor (1947) 329 US 495 , 516, "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."

18. The disputed information was legally privileged.

19. Section 42 confers on the litigant a qualified privilege so that the Tribunal is required to assess the balance of public interests for and against disclosure, bearing well in mind that information must be disclosed unless the interests favouring withholding it outweigh those supporting disclosure.

20. The strong public interest in respecting the long – established confidentiality of client – lawyer communications, hence the requirement of a powerful counterbalancing interest in disclosure was recognised from the earliest days of the FOIA jurisdiction - *Bellamy v Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023); Department of Business and Regulatory Reform v O'Brien [2009] EWHC 164.* That interest is as strong where the client is a public authority as in the case of an individual.

21. The public interest in disclosure of this disputed information is minimal or non – existent. If disclosure were at all likely to reveal misconduct on the part of the SSJ or the GLD, there would be a case for disclosure but there is no serious basis for any such claim. The High Court accepted, as, with respect, common sense strongly

suggested, that the intrusion of the SSJ as defendant or respondent was simply an error and an error so obvious that the costs of the JR application were awarded against Mr. Matthews. The Court of Appeal refused leave to appeal. The ICO, like the Tribunal, was fully entitled to have regard to those facts when determining the strength of any public interest in disclosure.

22. The general public interest in transparency carries little weight in relation to this information, disclosure of which would almost certainly tell the public nothing of any consequence.

23. That the GLD changed its position as to reliance on s.42 does not assist this appeal. The Tribunal is concerned to determine whether the DN was in accordance with the law. That involves the question whether the ICO was right to uphold the GLD's reliance on s.42 in its submission to her. In any case the GLD initially abandoned reliance on s.42 because it did not interpret Mr. Matthews' inquiry as a s.1 request at all. The ICO disagreed so the GLSD reverted to reliance on the exemption, as was inevitable. We should add that public authorities quite often change their stance on exemptions in the course of an investigation for less compelling reasons than in this appeal. The Tribunal's task is to adjudicate on exemptions relied on by the public authority at the appeal stage, subject to its power to refuse belated amendments.

24. We acknowledge Mr. Matthews' commitment and sincerity in pursuing this appeal but regret to conclude that his underlying hypothesis is quite unrealistic.

25. For these reasons we dismiss this appeal.

26. This is a unanimous decision.

David Farrer Q.C.,
Tribunal Judge,

Date of Decision: 31st July, 2017
Date Promulgated: 15th August 2017