Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0092

Information Commissioner's Ref: FS50120007

Freedom of Information Act 2000 (FOIA)

Appeal Heard on Papers	**Decision Promulgated**
31 March 2008	**29 April 2008**

BEFORE

INFORMATION TRIBUNAL

DEPUTY CHAIRMAN

D.J. Farrer Q.C.

and

LAY MEMBERS

Henry Fitzhugh & Malcolm Clarke

Between

FOREIGN AND COMMONWEALTH OFFICE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: **Ms. Karen Steyn**

For the Respondent: **Mr. Timothy Pitt – Payne**

Decision

1 We allow this Appeal. The Appellant is therefore not required to take any action to comply with paragraphs 35 and 36 of the Decision Notice.

Reasons for the Decision

The Request

2 On 18th October 2005, Mr. Barry Lennox asked the Appellant (the "FCO") for disclosure of "the full opinion given by the FCO legal adviser referred to in the FCO letter of 21st May 2004 to the Overseas Services Pensioners' Association".

3 The letter, headed "Zimbabwe Public Service Pensioners" was sent by Mr. Andrew Hopkinson of the Africa (Southern) department of the FCO to Mr. David Le Breton of that Association. It arose from a meeting with the Association in February, 2004 at which a paper had been presented on behalf of the Association evidently discussing the problems faced by pensioners of the Zimbabwe government resident in the UK, whose pensions were no longer being paid. The critical issue was whether the UK government might in law have a residual responsibility for the payment of such pensions or might be tortiously liable for losses suffered by unpaid pensioners as a result of its handling of their interests, when negotiating the terms of the constitution of Zimbabwe or at some other time.

4 It referred expressly, indeed, in the second paragraph, verbatim, to advice received from "our legal adviser". It cited relevant legislation establishing and later reorganising the Southern Rhodesia[1] Pension

[1] The name of the country under colonial rule and in the period of unilateral independence under the government of the late Ian Smith.

Fund and the Southern Rhodesian Widows` Pension Fund. It concluded that the UK government was never a trustee of those funds and that, had it been, it would have discharged its duty as trustee by negotiating a provision in the constitution for the remittance of pensions to external pensioners.

5 A letter of 14th. November, 2005 from the FCO to Mr. Lennox referred to exemptions later abandoned and the need for a further period to study the balance of public interest. This letter was not and did not purport to be a notice of refusal of the request.

6 By letter of 5th. December, 2005 from Simon Atkinson of the Zimbabwe section, the FCO refused the request, relying now on the exemption conferred by FOIA s.42 (1) which reads :

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

The exemption is one to which s.2(2)(b) applies, hence the issue of balancing public interests arises, if the exemption is engaged.

7 In dealing with the public interest test, the letter acknowledged a general public interest in transparency but set out arguments against disclosure of the full advice received which, it concluded, were decisive, and which have been developed in the Notice of Appeal and a further submission to the Tribunal.

8 Mr. Lennox `s request for an internal review was refused on 28th. April, 2006 on similar grounds. The FCO drew attention to the Tribunal decision in *Bellamy v Information Commissioner and Secretary of State for Trade and Industry EA/2005/0023* in emphasising the weight to be

attached to legal professional privilege, when considering competing public interests.

9 Mr. Lennox complained to the Respondent ("the IC ") on 8th. May, 2006. On 3rd. May, 2007, the IC obtained from the FCO, on the usual confidential basis, a copy of the opinion referred to. It has been supplied to the Tribunal. Why such a delay occurred is not apparent.

10 In his Decision Notice dated 6th. August, 2007, the I.C. noted that the letter of 21st. May, 2004 quoted extensively from the advice. He referred to and placed considerable reliance on *Kirkaldie v IC and Thanet District Council EA/2006/001,* citing the Tribunal `s explanation of " the cherry – picking rule " as the rationale for the principle, that is to say the unfairness implicit in allowing a party to deploy those elements in a privileged document that assist his case and then to refuse disclosure of that which may be less favourable to it. He rejected an argument of the FCO, very fully developed in a letter of 14th. June, 2007, that waiver could occur only in the context of litigation.

11 He ruled, therefore, that the FCO had waived privilege in the opinion by virtue of sending the letter of 21st. May, 2004. That being so, no question of balancing public interests arose for decision. He required the FCO to disclose the opinion to the complainant in full within thirty – five calendar days.

12 Furthermore, publication to Mr. Le Breton of the contents of the letter amounted to publication to the world at large so that privilege in anything which the letter disclosed had been waived generally. This second ruling has not been contested by the FCO on this appeal, clearly rightly.

13 The IC further ruled that the FCO had breached s.17 of FOIA by virtue of its letter of 14th. November, 2005 (paragraph 5), which cited

exemptions not later relied on and failed to explain how they were engaged. No appeal is made against that ruling.

14 By notice of 30th. August, 2007, the FCO appealed against those elements of the Decision Notice referred to in paragraph 10 above. It reiterated the argument as to the limited application of the principle of collateral waiver to cases where parts of privileged material had been deployed in litigation and went on to advance arguments supporting the public interest in refusing disclosure. We shall review those arguments briefly in due course.

15 In his Reply the IC appeared rather to change tack. In paragraph 21 he maintained, somewhat faintly, the claim that, by writing the letter, the FCO had waived privilege as to the whole of the opinion. He then proceeded to argue that a comparison of opinion and letter revealed that the letter substantially disclosed the content of the opinion. So there was, for practical purposes, nothing left to which privilege could attach anyway.

16 He then addressed the arguments as to public interest. He asked the Tribunal to uphold the Decision Notice on the grounds relied on in the Decision Notice; alternatively, if it ruled that s.42 was engaged, on the alternative ground that the public interest in maintaining privilege in this case was outweighed by the interest in disclosure.

17 We refer above to a change of tack because the IC `s new approach appears to contradict his earlier adoption of the cherry – picking argument. That argument rests on the obvious point that partial deployment may unfairly hide from the opponent and the judge other material adverse to the case of the disclosing party which, if revealed, would put a quite different complexion on the whole. Now the IC is saying that the whole opinion has been effectively disclosed in the letter. The change of stance is the more odd because he had seen the opinion before the Decision Notice was drafted.

18 We do not, of course, suggest any bad faith on anyone `s part, rather a certain inconsistency in argument.

19 The issues on appeal

Be that as it may, the question of collateral waiver requires determination. So the issues are:

(i) On the "cherry – picking" principle (collateral waiver), did the sending of the letter amount to a waiver of the whole opinion which it quoted and from which its arguments appeared to be drawn? That depends on whether the principle of waiver is limited to cases where a party to litigation seeks to rely on privileged material or whether it has a wider application.

(ii) If it does not, did the publication of the letter amount to publication of the opinion so that waiver had been effected by voluntary, albeit unintended disclosure?

(iii) If it does not, does the public interest in upholding legal professional privilege in this case outweigh the public interest in disclosing this opinion?

20 Collateral waiver of privilege

The IC in the Decision Notice relied strongly on *Kirkaldy*. That was a case in which a member of a local authority had summarised Counsel `s advice as to a requirement for planning permission at a council meeting. The council thereafter refused to disclose that advice, when requested. Litigation was neither underway nor in contemplation. The Tribunal was referred to *R v Secretary of State for Transport ex parte Factortame [1997] 9 Admin. L.R. 591, Paragon Finance v Freshfields [1999] 1 W.L.R. 1183, Dunlop Slazenger International Limited v Joe Bloggs Sports Limited [2003] EWCA Civ. 901* and *Chandris Lines v Wilson and Horton Limited [1981] 2 NZLR 600.*. The Tribunal referred

to the fairness and “cherry – picking” arguments and the need for reliance on the content of a document before the principle is engaged. Its conclusion was that privilege had been waived by the council and it ordered that the appellant have facilities to inspect the advice. Whilst citations to the Tribunal referred to the context of litigation, it is clear that the distinction relied on by the FCO here was never expressly argued.

21 We are grateful for the further citation of authority on this point by the FCO but do not think it necessary to examine it in detail in this Decision because the weight of authority is perfectly clear. In our opinion, the principle of collateral waiver applies only to cases where privileged material has been relied on in the course of litigation. To quote Mustill L.J. in *Nea Carteria Maritime Co. v Atlantic and Great Lakes Steamship Corp. [1981] Com. L.R. 139* :

“Where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves what the party has chosen to release from that privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.”

22 Authority apart, there is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent will see what he is doing and demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate. Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned. Quite different is the

position where the parties come to court; if evidence is adduced, it is there to be fully tested or scrutinised in relation to any relevant issue, whether it be witness, document or object.

23 Lastly on this subject, we observe that this Tribunal, differently constituted, has reached similar conclusions in two recent appeals, *Kessler v I.C. and HMRC EA/2007/0043 paragraph 44* and *Mersey Tunnel Users Association v I.C and Merseytravel EA/2007/0052 paragraphs 26 and 27.* We do not think that *Kirkaldy* can be distinguished on its facts, rather that this Tribunal applied the collateral waiver rule outside its proper limits because those limits were not drawn to its attention.

Does the letter amount to substantial disclosure?

24 This alternative argument amounts to saying; "You have shown us everything that matters; there is no sensible reason to withhold the rest". If that is true, the value of further disclosure is obscure but we shall assume that that is not a ground for refusal of the request. What is asserted is a form of express, albeit unintended, waiver of privilege.

25 We have received copies of the opinion and a helpful analysis from the FCO, comparing letter and opinion. We are satisfied that the opinion covers points which do not appear in the letter although, as stated below, we do not believe that the applicant has been misled over the substantive legal position as a result of this. The comparison is dealt with in a very short closed Annex to this Decision. This argument fails.

The public interest

26 The arguments for disclosure advanced by the IC in his reply are as follows:

- The opinion has been substantially disclosed so that the interest in maintaining legal professional privilege (acknowledged to be a strong one in most cases) is substantially weakened ;
- There is a strong public interest in knowing whether the letter fairly reflects the legal advice received by the FCO;
- The subject matter – the possible liability of the government to former civil servants in Southern Rhodesia – is of considerable intrinsic importance;
- Disclosure of this advice would be of substantial value to public debate on the issue.

27 The FCO argues:

- Legal professional privilege is of fundamental importance in our society; to override it requires a very strong conflicting interest.
- There is no powerful countervailing interest ;
- If the government is to receive high quality legal advice, a frank exchange of information and opinion between government officials and advisers and a full review of all the arguments for and against a particular position are essential. Such frankness is imperilled by the prospect of early disclosure.

28 This Tribunal has recognised the important public interest in maintaining legal professional privilege in a number of decisions, hence the need for powerful countervailing interests, if it is to be overridden[2]. A very useful review of tribunal authorities is to be found at paragraphs 28 – 33 of the Decision in *Pugh v IC and MOD EA/2007/0055.* Such an approach is hardly surprising since s. 42 is the first statutory inroad into a principle held sacrosanct by the common law for several centuries. At the same time, we must not ignore the need to examine the effect of overriding privilege in the particular case under review. We bear in mind that the exemption, like every exemption under s.2(2) (b),

[2] E.g., *Bellamy v IC and Secretary of State for Trade and IndustryEA/2005/0023, Adlam v I.C.and HMT EA/2006/78, Pugh (see above), Gillingham v ICEA/2007/0028*

can be relied on only where the interest in disclosure is outweighed by the interest in maintaining it.

29 What sort of public interest is likely to undermine the maintenance of this privilege? There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it obtained.

30 The interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go. Disclosure of privileged opinions is not a substitute for legal aid.

31 We received in the closed bundle (open of course to the only other party, the IC) a witness statement from Jane Darby, Assistant Director of the Information Management Group at the FCO. Whilst it contains matters particular to this case, it sets out general considerations applicable to the obtaining of legal advice by the government and, perhaps on less prominent issues, to public authorities generally. Indeed, she sets out eloquently the justification for the whole principle of legal professional privilege. She stresses rightly the paramount need for candour and a full briefing from the client. Equally, it is vital that the advice sets out all relevant competing arguments before expressing a view as to which should prevail. That all this should be exposed to public view without powerful justification would, she says, inhibit the proper running of the whole process.

32 The Tribunal is conscious that these arguments bear some similarities to those hitherto unsuccessfully advanced in some of the appeals to this Tribunal by government departments seeking to withhold access to records of departmental meetings and communications with ministers. However, there is a fundamental difference in the very fact of legal professional privilege which attaches to the communications under scrutiny here. Such a privilege never extended to minutes of departmental meetings, however confidential their perceived status. Moreover, legal advice, by its very nature, will normally record the instructions received and the possible weaknesses in the case to be advanced much more fully than the average departmental minute. There is in our view, therefore, no inconsistency in treating the one species of information differently from the other.

33 Our Conclusions on the public interest

We have no doubt that the exemption should be maintained in this case. The IC `s argument that the public has an interest in seeing whether the letter misrepresents the opinion is one which, if correct, would justify disclosure in every case where it is known that legal advice was sought. Such an argument depends on some cogent evidence that there may have been a misrepresentation. We have read it. There is none.

34 Otherwise, the IC `s argument boils down to a general public interest in promoting debate on the pensions issue by exposure of the advice. We think that public discussion would be assisted to a very modest degree, if at all, by disclosure.

35 On the other hand, we have regard to the general arguments advanced by the FCO. Disclosure of this particular opinion might have few adverse consequences but the Tribunal cannot ignore the broader

issue of principle developed by Ms. Darby and summarised above. It clearly outweighs the rather fragile advantages in disclosure advanced by the IC.

36 For these reasons we allow this appeal.

David Farrer Q.C.
Deputy Chairman 28 April 2008