Tribunals Service
Information Tribunal

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL

Appeal No: EA/2009/0035

BETWEEN:

ROBERTS **Appellant**

and

THE INFORMATION COMMISSIONER
Respondent

and

DBIS
Additional Party

RULING ON AGREED BUNDLE

Subject matter: Data Protection: Confidentiality of information s.59

Cases:

Background.

This Appeal is due to be determined, on the papers and without a hearing, at a meeting of the panel on 10th September. It will turn on:

(a) whether the information in dispute falls within the exemption provided by FOIA section 36(2)(c) (reasonable opinion of a qualified person that disclosure would prejudice, or be likely to prejudice, the effective conduct of public affairs); and, if so,

(b) whether the public interest in maintaining that exemption outweighs the public interest in disclosure.

Directions have previously been given for the preparation of an agreed bundle by 24th July, followed by the service of any witness statements by 14th August and of written submissions by 28th August.

The dispute over bundle content.

The bundles were submitted to the Tribunal by the Information Commissioner in the form of an open bundle and a closed bundle. The open bundle had a number of blank pages. These represented the documents that the Additional Party objected to being made available to the Appellant. It also had certain words or passages redacted from

other pages, representing parts of the documents that the Additional Party did not wish to be disclosed to the Appellant. The bundle was sent to the Appellant. All the redacted pages were set out in full in the closed bundle, which was not made available to the Appellant.

The Information Commissioner explained to the Tribunal in correspondence that he had submitted the bundles in this form because he had been unable to reach agreement with the Additional Party on the content of the open bundle but wished to make those documents that had been agreed available to the Appellant in good time. He considered it preferable to deliver a part-agreed bundle in good time rather than further delay matters in trying to reach full agreement with the Additional Party. The Appellant is representing himself and the papers had to be delivered to him in hard copy at his home in the USA. The Information Commissioner's decision therefore made good sense although it has given rise to a degree of confusion about the status of certain document within the bundles. He has placed the blame for this on delay by the Additional Party but I do not need to go into how the problem arose. Work overload and competing priorities arise in the best ordered offices and my focus is on the solution to the problem that has arisen, not the cause.

Pre-hearing review.

By 6th August the area of disagreement had narrowed and further pages were released for inclusion in the open bundle. However, because of the continuing disagreement on the remainder of the documents, I convened a further pre hearing review, in the form of a conference call between the Information Commissioner and the Additional Party on 14th August in order to hear argument on the remaining points of difference. In the event the Information Commissioner was unable to be represented during the conference call but made it clear that, having made his points in correspondence, he was happy to leave it to me to make a decision on the basis of that correspondence and any additional submissions made on the Additional Party's behalf during the conference call.

In the course of the conference call it was accepted by the Additional Party's representatives that further documents should be put into the open bundle. These were recorded in an e mail to all parties from the Treasury Solicitor, representing the Additional Party, which was despatched on the same day and had copies of the released documents attached to it. In one case a small redaction had been made, at my direction.

The only documents which were left for me to decide on, at the end of the pre hearing review, were the following:
1. An internal memorandum dated 31 May 2005 addressed to the individual who was to conduct an internal review of the original decision to refuse the Appellant's original request for information. It records the background to the request for internal review and sets out the arguments for maintaining the original decision. At that time the Additional Party was relying on the exemption under FOIA section 40 (data protection) and the arguments therefore addressed that issue only. The document says nothing about section 36.

2. An email string that was attached to document 1 in which members of the Additional Party's staff debated the terms of a draft response to the Appellant's original request for information.

I did not make a decision on these documents at the time because I wished first to see the witness statement that I was informed would be served on the other parties and the Tribunal later on the same day. I have now seen this. It provides a certain amount of background on the information in dispute but its main effect is to provide evidence in support of the Additional Party's arguments in respect of section 36 and the public interest balance.

I will now consider each of the documents in turn.

Document 1

The Additional Party objects to the disclosure of this document in the open bundle on the grounds that it relates to the business of the Additional Party for the purposes of Data Protection Act 1998 section 59(1). That subsection prohibits the Information Commissioner from disclosing information falling within its meaning (it being accepted that "business" for these purposes is a sufficiently broad term to cover the internal administration of the Additional Party's activities). The prohibition is disapplied only if the disclosure is made "with lawful authority". Section 59(2)(c) provides, in its current form, that disclosure is made with such lawful authority if it is made for the purposes of, and is necessary for, the discharge of any functions under either the DPA or the FOIA.

In reaching a conclusion on the point I think that I should give a broad meaning to the phrase "necessary for the discharge of any functions" under the relevant statutes. The function of the Tribunal, put at its most general, is to "provide for the orderly resolution of disputes" while upholding "the principle of legality and the rule of law"[i], in the same way as any other judicial forum. At a less general level the Tribunal's function is to determine whether the Decision Notice appealed against was in accordance with the law (FOIA section 58). In performing that function the Tribunal has wide powers to direct the parties to exchange lists of documents held by them which are "relevant to the appeal" (The Information Tribunal (Enforcement Appeals) Rules 2005 rule 14(2)(b)(i)). But this must not result in the disclosure of any material which the party could not be compelled to produce on the trial of an action in a court of law (rule 14(5)). In other words the scope of documentary disclosure may be as broad as that provided under the Civil Procedure Rules, but no broader.

It follows that there would be lawful authority for the disclosure of material well beyond just that which is determinative of any point arising for determination on an appeal. Any disclosure which a party might reasonably conclude supported his case or undermined that of his opponent would be permitted both during the determination of an Appeal and in the procedures leading up to it. This relatively broad interpretation of section 59 is consistent with the language of the Statute and Rules referred to. It also recognises that breach of the obligation of confidentiality is capable of being a criminal offence under section 59(3).

It is now customary on most, if not all, Appeals to the Tribunal for a direction to be made that the parties should seek to settle an agreed bundle of documents. This compresses a number of processes which might apply, including the disclosure by exchange of lists, inspection of disclosed documents, and the preparation of an agreed bundle containing those documents which are accepted as genuine and which will not therefore require to be formally proved by a witness. Of course it remains open for any party to challenge the correctness of statements contained in an agreed document. It is undoubtedly sensible for those more complex procedures to be simplified in this way, but it does not alter the nature of the agreed bundle. And it explains why it is unusual for the Tribunal to be required to resolve disputes on the content of an agreed bundle. It is right that it should be so – bundle preparation may require a degree of give and take between the parties, but it should rarely be necessary or appropriate to require the Tribunal to arbitrate any areas of disagreement.

When disputes do arise it is frequently over the issue of whether the inclusion of unredacted material in the agreed bundle would have the effect of disclosing the very information that forms the subject matter of the appeal. Although I am being asked to determine what redactions should be made in this case it is in a different context. The essence of the Additional Party's argument is that the document has little or no relevance to the issue the Tribunal will be required to decide and that its disclosure is not therefore necessary to enable the Tribunal to discharge its function on the Appeal. It is certainly the case that it relates only to section 40 and not to section 36 and I think that its only relevance is in showing the approach adopted by the Additional Party's staff at the time when it was written, before the decision was made to rely on only the second of those two sections. But the section 36 exemption is dependent upon the qualified person forming a reasonable opinion on the prejudice in question and it might be argued that one factor to be taken into account in reaching a conclusion on reasonableness is the route by which the qualified person, and more especially those who prepared any submission on which the opinion is based, reached the conclusion that the effective conduct of public affairs would be prejudiced.

It is not for me to decide, at this stage of the Appeal, the strength of that argument. I think the test I should apply is whether the Appellant might reasonably conclude that the document would assist his case and/or whether the lay members of the panel might reasonably consider that reaching a decision on the Appeal would be made easier if all parties, including the Appellant, were given the opportunity of commenting on the document in their written submissions. Having now read the Witness Statement served on behalf of the Additional Party I can see that it does not address the reasons considered by the qualified person when developing his opinion. Background materials will not therefore assist the Appellant in challenging the opinion on the basis that it is arguably inconsistent with the reasons for non-disclosure previously relied on by the Additional Party, or in making a decision on whether to mount such a challenge. However, it seems to me that the document under consideration still has a degree of relevance, not in potentially undermining any positive statement by the witness, but in supporting an argument that the reasonableness of the qualified person's opinion is undermined by both the absence of information on what he did take into account and the evidence that his department had not previously considered that the section 36 factors bore sufficient weight to be worth mentioning to the individual who had the task of reviewing the initial refusal to disclose.

I should make it clear that I am not expressing any view at this stage as to what the Tribunal may ultimately decide on this issue. I am simply trying to anticipate what impact the document in question may have on the other panel members and on the perception of a reasonable observer as to the fairness and transparency with which the Tribunal performs its function. On that basis I conclude that the relevance of the document, although marginal, is sufficient to justify it being included in the open bundle and made available to the Appellant.

In the present case the dispute that has arisen is made more complicated by the fact that the Additional Party has accepted that the document in question may be shown to the Tribunal. Or at least it has accepted that, having been included in the closed bundle that was made available to the Tribunal before the debate on bundle content had been completed, it should not pursue the argument that disclosure to the Tribunal itself fell within the prohibition set out in DPA section 59. That complicates the issue I have to decide. It means that, had I concluded that disclosure was not appropriate purely on the basis of relevance, I would have had to go on to the separate question of whether it would be consistent with the orderly disposal of disputes in accordance with general principles of legality for the material to be seen by the Tribunal, but not by the Appellant. I do not think it would have been and accordingly I would have directed that the document should be included in the open bundle on this basis also.

Document 2

Although this was included as background information for the addressee of Document 1 it records the thinking within the Additional Party's organisation at a much earlier stage in the process. It therefore has less significance than Document 1, but I nevertheless think that it should be treated in the same way as that document as it shows the reliance solely on section 40 persisted throughout the process of considering the request for information. I therefore direct that it too should be included in the open bundle.

The handling of material potentially covered by section 59.

I am conscious that my conclusion in favour of disclosure could have turned on the particular circumstance of the document having been made available to the Tribunal by the Information Commissioner before the debate with the Additional Party on bundle content had been concluded. I have not examined the Information Commissioner's complaint about delay on the part of the Additional Party. If the criticism turned out to have been unfounded then the result could have been that the Additional Party lost its ability to keep the document out of the open bundle as the result of an unauthorised disclosure by the Information Commissioner. Without deciding whether or not that would have been the case in the particular circumstances of this Appeal I would say, as a general comment on the impact of DPA section 59, that the discharge of the Tribunal's functions clearly includes the process by which it directs the parties to attempt to reach agreement on the content of an agreed bundle and the parties carry out that direction. I think it follows that it is at least highly arguable that disclosure of material by one party, in circumstances where it was reasonable to assume that the absence of objection or comment within a reasonable period of time from another party amounted to consent, also falls within the scope of

what is necessary for the discharge of the Tribunal's functions. And where the party making the disclosure in that type of circumstance is the Information Commissioner it is equally arguable that disclosure in those circumstances would also fall within his functions under the FOIA. It follows that if a party to an appeal wishes to rely on section 59 it should be prompt in making its position clear to the other parties with whom it is considering bundle content, or risk seeing its rights undermined.

Deputy Chairman 20 August 2009
Information Tribunal

' Halsbury's Laws of England Volume 8(2) paragraph 302

[i] Halsbury's Laws of England Volume 8(2) paragraph 302