



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

EA/2009/0070

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50132094
Dated: 27 July 2009**

Appellant: CHRISTOPHER BELLAMY

Respondent: THE INFORMATION COMMISSIONER

Additional Party: THE DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS

On the papers

Date of hearing: 8 February 2010

Date of Decision: 23 February 2010

Before

**Annabel Pilling (Judge)
Malcolm Clarke
and
John Randall**

Representation::

For the Appellant:	Christopher Bellamy
For the Respondent:	Richard Bailey
For the Additional Party:	Gerry Facenna

Subject matter:

FOIA Qualified exemptions – Legal Professional Privilege s.42
FOIA Public interest test s.2

Cases:

R v Cox and Railton (1884) 14 QBD 153

Kuwait Airways v Iraqi Airways (No. 6) [2005] 1 WLR 2734

Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013)

Department for Education and Skills v IC and Evening Standard (EA/2006/0006)

Department for Business, Enterprise and Regulatory Reform v O'Brien and Information Commissioner [2009] EWHC 164 (QB)

Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin)

Department for Culture Media and Sport v Information Commissioner (EA/2008/0065)

Department of Trade and Industry v Information Commissioner (EA/2006/0007)

Calland v Information Commissioner and FSA (EA/2007/0136)

Mersey Tunnel Users Association v Information Commissioner (EA/2007/0052)

DECISION OF THE FIRST -TIER TRIBUNAL

The Appeal is refused and the Decision Notice dated 27 July 2009 is upheld.

For the reasons given below we find that the exemption in section 42 of FOIA is engaged and that in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in favour of disclosure. The Department was entitled to withhold the disputed information.

Reasons for Decision

Introduction

1. This is an Appeal by Mr Christopher Bellamy against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 27 July 2009. The Decision Notice relates to a request for information made by Mr Bellamy to the Department of Trade and Industry, now the Department for Business, Innovation and Skills (the 'Department') under the Freedom of Information Act 2000 (the 'FOIA'). The request concerned the Department's approach to the Women Empowering Women scheme which circulated in the early 2000s and arose from Mr Bellamy's disagreement with the Department's view that the scheme was not unlawful under the Fair Trading Act 1973.

Factual Background

2. The Women Empowering Women ("WEW") scheme was an all-female 'pyramid investment' scheme that received prominent news coverage in 2001. The scheme required an initial outlay of £3,000 to become a "member" and the recruitment of eight new members, and promised a total return of £24,000 if all participants involved recruited enough new members. However, for each of those eight people to receive £24,000, 64 people must each contribute £3,000. For those 64 to receive payment, 512 would have to participate. The next levels would require 4096, then 32,768, then 262,144 participants. The supply of potential participants would quickly dry up, leaving the majority of people in the scheme having paid out a large sum and received nothing themselves.
3. The Department is of the view that the WEW scheme was not caught by Part XI of the Fair Trading Act 1973 as it had the characteristics of a chain letter (as excluded from the scope of trading schemes covered by Part XI by regulations 2 and 3 of the Trading Schemes (Exclusions) Regulations 1997) as there was no *requirement* to send monies to a promoter or central organiser and no trading of products or

services. Mr Bellamy argues that the scheme *demands* £3,000 and is therefore not excluded from the Fair Trading Act 1973. He argues that the Department's advice on such schemes is contradicted by the Fair Trading Act 1973 and the Department's own Trading Schemes Guide, and casts doubt about the validity of the Department's pronouncements on WEW.

4. It is against this background of uncertainty in relation to the legal position of this type of money circulation scheme that the Appellant sought to obtain information from the Department and, in particular, the advice to the Department on whether the WEW is illegal and in relation to the Department's efforts to close this type of scheme with amendments to the Fair Trading Act 1973 with the Trading Schemes Act 1996 and the Gambling Act 2005.

The request for information

5. On 15 April 2006 Mr Bellamy wrote to the Department requesting information as follows:

"I require reasoned explanations of the advice that the DTI put out about the Women Empowering Women scam at different time, together with a reasoned comparison of the Gambling Act 2005 clause on 'Chain –gifting' with the Trading Schemes Act 1996, such that you may determine for me if the offences created in the Gambling Act 2005 were indeed already criminal offences under the Trading Schemes Act 1996, or not..."

The headings under which I require the explanations are as follows, and attached is an 'Advice Summaries and Gambling Act 2005', together with associated documents which you should take into account in your explanations:

- a) *The 'chain-letter advice'*

b) *Patricia Hewitt's advice on WEW*

c) *Are the offences for 'chain-gifting' created under the Gambling Act 2005 also criminal offences under the Fair Trading Act 1973 Part XI as amended by the Trading Schemes Act 1996?"*

6. The Department wrote to Mr Bellamy on 17 May 2006 acknowledging the letter of 15 April 2006 and seeking clarification of the request. The Department advised that, from the letter and attachments, it had identified the following requests for information:

"(1) A request for "a reasoned argument for the advice put out by the DTI in its 'draft response' dated 6 April 2001";

(2) "reasons for the lengthy delay in understanding whether this pernicious scheme was legal or illegal, and under what legislation";

(3) "a reasoned argument for the advice put out by Patricia Hewitt on the DTI website on 16 July 2001;

(4) "a reasoned response to the questions raised by Mr Page on 30 November 2004";

(5) "the draft response for Mr Caborn to the questions asked by Mr Page";

(6) An explanation of why an amending SI to cover WEW under the Trading Schemes Act was not considered instead of the primary legislation in the Gambling Bill".

7. Mr Bellamy responded by letter dated 18 May 2006. He asked the Department to note that "any reasoned argument, response or explanation you provided, should include the essential factual and legal basis of your reasoning, as detailed in my

letter of April 15 2006.” He agreed with the Department’s list of his requests but added point (c) from his letter of 15 April 2006: *“Are the offences for ‘chain-gifting’ created under the Gambling Act 2005 also criminal offences under the Fair Trading Act 1973 Part XI as amended by the Trading Schemes Act 1996?”*

8. On 18 May 2006 the Department wrote to Mr Bellamy to advise him that a qualified exemption applies to the information sought, namely section 42 of FOIA. Section 10(3) of FOIA allows a public authority to take “such time as is reasonable in the circumstances” to consider the public interest test. It indicated that it hoped to have a response by 14 June 2006.
9. The Department sent its substantive reply on 9 June 2006. It explained that under section 1 of FOIA an applicant is entitled to be informed by a public authority whether it holds information requested by him and, if it does hold that information, to have that information communicated to him, subject to the exemptions found in FOIA, and that the Department is not obliged under FOIA to create a “reasoned explanation” of the various matters raised by Mr Bellamy. However, the Department went on to provide some explanation and also indicated that in respect of items identified as (2), (4), (5) and (6) above that it did not hold that information. It also indicated that it was withholding the legal advice it had received on the matter under section 42 of FOIA as the public interest in maintaining the exemption outweighed the public interest in disclosure.
10. Mr Bellamy was dissatisfied with the response and requested an internal review on 29 June 2006.
11. On 11 August 2006 the Department wrote to Mr Bellamy advising him that it was upholding the decision to withhold the information in reliance on the exemption under section 42 of FOIA and also providing further explanation in relation to the issues raised about the WEW scheme.

The complaint to the Information Commissioner

12. Mr Bellamy contacted the Commissioner on 4 September 2006 requesting an investigation into the handling of his request for information. The Commissioner informed the Department of the complaint by letter dated 14 September 2006 but no case officer was appointed until January 2008.
13. The Commissioner then investigated the substantive complaint, receiving additional arguments from Mr Bellamy and the Department. There was a delay in receiving the disputed information from the Department; this was requested by the Commissioner on 16 January 2008 but not received until 21 July 2008.
14. The Commissioner issued a Decision Notice on 27 July 2009. He concluded that the Department was entitled to withhold the disputed information on the basis that it fell within the exemption in section 42 of FOIA and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Appeal to the Tribunal

15. Mr Bellamy appealed to the Tribunal on 22 August 2009.
16. The Tribunal joined the Department as an Additional Party.
17. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents.
18. In addition, the Tribunal was provided with a Closed bundle of documents. This bundle included the disputed information. This was not made available to Mr Bellamy as to disclose it to him would defeat the purpose of this Appeal. In order to preserve the confidentiality of the disputed information we have not referred to its contents in this Decision.

19. Although we may not refer to every document in this Decision, we have considered all the material placed before us. We have considered in detail the written submissions from the parties although we do not begin to rehearse every argument in this Decision.

The Powers of the Tribunal

20. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

21. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in

dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

22. The question of whether the exemption in section 42 of FOIA is engaged and whether the consequential public interest test was applied properly are questions of law based upon an analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The Issues for the Tribunal

23. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

24. Although Mr Bellamy submits that this appeal concerns his attempt under FOIA to get the Department to “explain to him the factual and legal basis for its view, in apparent contradiction to its own published guidance and statements by ministers as to the relevant law, that the WEW scam fell outside the scope of the regime of the 1973 Act¹”, FOIA does not impose a duty on a public authority to answer enquiries or to create “reasoned explanations” for its actions.

25. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)). Section 42 of FOIA is a qualified exemption.

26. The issues for determination in this Appeal are

- i) whether the disputed information falls within the exemption in section 42 of FOIA, and, if so,
- ii) whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

27. Within his Grounds of Appeal and written submissions, Mr Bellamy addresses other issues that are irrelevant to the issues before the Tribunal; for example, the determination of substantive issues of law arising under interpretation of the Fair Trading Act 1973, the Trading Schemes Act 1996 and the Gambling Act 2005, the reasonableness or otherwise of the Government's response to the WEW scheme, the correctness or otherwise of statements in guidance issued by the Department, and allegations of "wrongdoing" against the Department. These matters are outside the scope of this appeal and not within jurisdiction of this Tribunal. We appreciate that Mr Bellamy may have misunderstood the jurisdiction of this Tribunal, or wished it to consider matters outside its jurisdiction to give guidance, but we do not fulfil an "Ombudsman" role and it is not for us to judge how the Department handled the WEW issue.

Does the disputed information fall within the exemption in section 42 of FOIA?

28. As we have said above, the right to information under FOIA does not impose a duty on a public authority to answer enquiries or to create "reasoned explanations" for its actions. However, in seeking to assist Mr Bellamy and address his request, the Department did provide some explanation and assistance about its views regarding WEW. It also took the view that internal legal advice it held in relation to the lawfulness of the WEW scheme was information that should be regarded as being within the scope of the request.

¹ The Fair Trading Act 1973

29. We note that the Department has, in our opinion, complied with the duty under section 16 of FOIA to provide advice and assistance to Mr Bellamy. It has taken what we consider to be a commendable approach; offered explanations where there was no obligation to do so and identified categories of information that were not specifically requested by Mr Bellamy but that the Department considers would fall within the scope of the information he sought.

30. Section 42 of FOIA provides as follows:

(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.

31. The Tribunal considers that the meaning and effect of section 42 FOIA is clear. The only question for the Tribunal can be whether, in respect of the information requested, under English law a claim to legal professional privilege could be maintained or whether under Scots law a claim to confidentiality of communications could be maintained in legal proceedings. If the answer is “yes”, the information falls within the scope of section 42 of FOIA and the qualified exemption is engaged. This question may be more difficult when the privilege is sought to be extended to material such as notes, memoranda and correspondence that relate to information sought by a legal adviser to enable the provision of legal advice.

32. Mr Bellamy argues that the “fraud exception” applies to the disputed information in that the legal advice discloses “wrongdoing by or within a public authority” such that it cannot attract legal professional privilege.

33. The “fraud exception” to legal professional privilege derives from *R v Cox and Railton*² and applies to documents or communications which are themselves part of a crime or fraud, or which seek or give legal advice about how to facilitate the commission of a crime or fraud:

“The reason on which the rule [of privilege] is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not ‘come into the ordinary scope of professional employment’. (per Stephen J at p.167)

34. In *Kuwait Airways v Iraqi Airways* (No. 6)³, Longmore LJ explained:

“The principle invoked...is known to lawyers as the “fraud exception” to the ambit of legal professional privilege and can be summarised by saying that if a person consults a solicitor in the furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client (or his agent) and the solicitor do not attract legal professional privilege.”

35. We have seen the disputed information in this case and are satisfied that it amounts to legal advice and therefore falls within the category of material for which a claim for legal professional privilege could be maintained in legal proceedings. The lawyer/client communications that make up the disputed information were plainly not intended to further any criminal purpose. We are satisfied that the “fraud exception” does not arise in this case.

36. Consequently we are satisfied that section 42 of FOIA is engaged. We therefore move on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

² (1884) 14 QBD 153
³ [2005] 1 WLR 2734

The Public Interest Test: General Principles

37. We agree with Mr Bellamy's submission that there is no absolute exemption from disclosure for information falling within the scope of legal professional privilege and we must therefore consider where the balance of the public interest lies in respect of the disputed information.

38. There is now a considerable body of case law from this Tribunal on the issue of legal professional privilege, both under the FOIA and the Environmental Information Regulations 2004. The Panel Members of this Tribunal have sat on a number of these cases and are familiar with the arguments advanced by each party. It is not necessary or helpful for us to set down in this Decision a detailed review of those cases. We consider that the following principles, drawn from relevant case law, are material, both generally and with particular reference to section 42 of FOIA, to the correct approach to the weighing of competing public interest factors. We note that the principles established by these cases do not form a rigid code or comprehensive set of rules and we are, of course, not bound by decisions of differently constituted Panels of this Tribunal. We regard them as guidelines of the matters that we should properly take into account when considering the public interest test but remind ourselves that each case must be decided on its own facts.

- (i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld (*Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC* (EA/2006/0011 and 0013) ('*Brooke*') (at paragraph 82).
- (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information (see, for example, *Department for Education and Skills v IC and Evening Standard* EA/2006/0006 (DfES) at paragraphs 64-65).

- (iii) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- (iv) The mere fact that legal professional privilege applies to information is insufficient to justify non-disclosure. A public authority is only entitled to refuse to disclose such information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
- (v) The approach for the Tribunal is to acknowledge and give effect to the significant weight to be afforded to the exemption in any event, ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least⁴.
- (vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. *“A factor which applies to very many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so.”* (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin)).
- (vii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of freedom of information regimes and are likely to be relevant in every case where the public interest test is applied. However, to bear any

material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture Media and Sport v Information Commissioner*⁵).

- (viii) The “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner*⁶).
- (ix) Some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential (*Calland v Information Commissioner and FSA*⁷).
- (x) The age of the legal advice contained in the information is relevant. The passage of time would, as a general principle, favour disclosure. Legal advice is, however, still “live” if it is still being implemented or relied upon as at the date of the request or may continue beyond that date to give rise to legal challenges by those unhappy with the course of action adopted.

The Public Interest Test: Factors in favour of maintaining the exception

39. Applying the approach identified by Wyn Williams J in *Department for Business, Enterprise and Regulatory Reform*, we accept that we must give significant weight to the “in-built public interest in withholding information to which legal professional privilege applies”, then ascertain whether, at the relevant time, there are particular or further factors in the instance case which point to non-disclosure, and then

⁴ Per Wyn Williams J in *BERR v O’Brien and Information Commissioner* [2009] EWHC 164 (QB)

⁵ EA/2007/0090 (‘DCMS’) at paragraph 28

⁶ EA/2006/0007 at paragraph 50

⁷ EA/2007/0136

consider whether the features supporting disclosure are of equal weight at the very least.

40. We acknowledge that disclosure of legal advice is likely to lead to prejudice to public authorities in obtaining advice on their legal rights, obligations and liabilities. Confidentiality is crucial to the effective working of the relationship between lawyer and client, whether the client is a private individual or a public authority. Advice from solicitors or counsel is, of course, a professional opinion on a particular set of facts and circumstances and may differ. Regular or routine disclosure of such advice would prejudice the public authority from adopting a more favourable or an alternative position. We also note that disclosure under the FOIA is effectively made to the general public as a whole, as disclosure cannot usually be made subject to conditions governing the subsequent use of the disclosed information.

41. In addition to that significant public interest in favour of protecting information covered by legal professional privilege generally, the Commissioner identified two factors specific to the instant case which weigh in favour of maintaining the exemption:

- (i) the legal advice contained in the disputed information was, at the time of the request, relatively recent; and
- (ii) the advice was also “live”, in the sense that it was, at the time of the request, informing the Department’s approach to the WEW and similar schemes and to the implementation of the Gambling Act 2005, which includes provisions to outlaw chain gifting schemes similar to WEW.

42. The Department submits that Government departments must be able to obtain dispassionate legal advice to inform the business of government and to ensure that legal risks are properly assessed so that appropriate and lawful decisions are taken in the public interest. It explains that the protection afforded by legal professional privilege enables officials and ministers to obtain frank legal advice, including on legal risks associated with any proposed action. The Department submits that it would be unfair, and would undermine the ability of government departments to obtain such advice, if the lawyers who advise government feared that their advice

may be disclosed at a time when it could damage the public authority's position (for example, because it concerns the legal merits of an ongoing active policy).

43. We agree with the Commissioner and the Department that both the additional factors identified deserve to be given significant weight. Where legal advice is recent and informs ongoing policy-making (such that, for example, it may turn out to be relevant to a possible legal challenge) the importance of protecting the confidentiality of the advice is heightened. The disputed information is legal advice which informed the guidance and information the Department put out at the time of the WEW scheme, and which informed the approach of the government to implementing the Gambling Act 2005⁸ at the time of the request made by Mr Bellamy. We are therefore satisfied that it was recent and "live" at the relevant time.

44. We have also identified an additional factor that adds some weight to the balance in favour of maintaining the exemption which was not raised by the parties. We consider that disclosure of relevant legal advice could lead to a position where those who operate essentially dishonest schemes such as WEW could take advantage of perceived lacuna in the legislation and be able to adapt the scheme accordingly to avoid prosecution. There can be no public interest in advertising the existence of a possible loophole, so that it may be exploited in the period prior to it being closed by fresh legislation.

The Public Interest Test: Factors in favour of disclosure

45. The following factors in favour of disclosure have been identified by Mr Bellamy:

- (i) the fact that the Department's interpretation of the Fair Trading Act 1973 is a matter of wide public interest and commercial importance;
- (ii) the public interest in understanding why the Department took a view as to the non-applicability of the Fair Trading Act 1973 to WEW when

⁸ The Gambling Act 2005 was brought into force on 1 September 2007.

that view was, in Mr Bellamy's opinion, at first inconsistent with the terms of the Act and the Department's own guidance;

- (iii) the fact the Commissioner's case officer did not discuss why the "fraud exception" did not apply to the disputed information;
- (iv) the fact that the Commissioner did not consider the possibility of whether the disputed information discloses wrongdoing by or within the Department, or a misrepresentation to the public of the advice received, or an apparently irresponsible and wilful disregard of advice.

46. We agree with the submissions of the Department that items (iii) and (iv) are procedural matters. The "fraud exception" has been dealt with above at paragraphs 32-35. We consider that there is public interest in knowing whether the Department acted in accordance with or contrary to legal advice. If the information protected by legal professional privilege showed any evidence of malfeasance or negligence or any misrepresentation of advice in published guidance by the Department, then there would be a very strong public interest argument in favour of disclosure. Having examined the disputed information we can state that this is not the position in the instant case. The fact that Mr Bellamy does not agree with the information issued by the Department in relation to the WEW scheme is not relevant to the public interest test. It is not within our jurisdiction to decide whether the advice was correct or not.

47. We also consider that the concern over whether schemes such as WEW were being properly regulated is a matter in the public interest in favour of disclosure. The Department accepts that its approach to the Fair Trading Act 1973 is a matter of public interest. It has issued detailed guidance on the legislation in the Trading Scheme Guide and in a "fact sheet" on "Trading Schemes, Pyramid Selling" available on its website.

48. The disclosure of the disputed information is not necessary for the public to obtain information about the Department's view of the law that is not already clear from publicly available material. Moreover, we agree with the Department

that the disputed information does not relate to the legislation generally but to the specific application of the legislation to the WEW scheme. Its disclosure would cast little, if any, additional light on the Department's approach to the trading schemes legislation more generally.

49. Although Mr Bellamy submits that the Commissioner should have given weight to the background of uncertainty in relation to the legal position of this type of money circulation scheme and the reason for his request, applications for information under FOIA are "motive blind" and the intentions of the requestor are irrelevant. It is not a factor we give any weight to when assessing the public interest balance.

50. Mr Bellamy submits that if WEW is indeed "truly, legally" found to be exempt from the Fair Trading Act 1973, the Department's efforts to close this type of money circulation scheme with the amendments to that Act with the Trading Schemes Act 1996 have clearly failed, and this should be taken into account in the public interest and favour disclosure. He does not explain how this favours disclosure. Having viewed the disputed information we do not consider that it has any bearing on this particular issue and therefore this is not a factor we take into account when assessing where the public interest lies in this case.

51. The Department submits that the fact the legal advice the Department received in relation to WEW may be of interest to Mr Bellamy, or that he may disagree with it, does not mean that its disclosure is in the public interest. Curiosity as to the legal advice a public authority has received, or the fact that its disclosure may enable the public to better understand the legal argument relevant to the issue concerned, are "weak" factors in favour of disclosure. We agree and consider that this is particularly true in the instant case where the advice was "live" and therefore potentially relevant to future legal proceedings involving the Department.

52. Mr Bellamy also refers to the number of people affected by the WEW scheme and argues that this is an additional factor to be taken into account in favour of disclosure. Figures drawn to our attention suggest that as many as 150,000

people have been affected by the scheme. Numbers of people affected was a consideration raised by the Tribunal in *Mersey Tunnel Users Association v Information Commissioner*⁹ (*'Mersey Tunnel'*). In that case those affected were tunnel users, who were obliged to pay the toll for using the tunnel, and the generality of council tax payers who had financed tunnel losses. Those affected were obliged to pay tolls or council tax at the levels set, and the legal advice that was the subject of the application had a direct bearing on the setting of tolls and tax. By contrast WEW was an optional scheme, there was no obligation to take part. Those participating may not have realised there was a significant risk that they would lose their investment, and that they were taking a gamble that they would receive money from future participants in the scheme. However, warnings about WEW had been published by the Department, and would not be added to in any material way by the disclosure of the disputed information. This, and the optional nature of the scheme means that the numbers involved do not weigh as heavily as they did in *Mersey Tunnel*. We conclude they are a factor that does not have great relevance to the public interest test.

53. Mr Bellamy argues that the Department is a prosecutor for the purposes of the Fair Trading Act 1973 and that information on the reasoning not to prosecute those behind the WEW scheme should be made available so individuals would understand that decision. Mr Bellamy suggests that he would have been provided with this information under the Victims' Charter or the Victims' Code of Practice by the Crown Prosecution Service if it were the body responsible for bringing prosecutions under the Fair Trading Act 1973. He draws our attention to the adoption of the Prosecutors' Pledge and the amendment by the Department that it "will communicate with the victim within 5 working days of the decision to withdraw or alter charges." Mr Bellamy's submissions regarding this matter make a number of presumptions: a) that those behind the WEW scheme would be identified, b) that their actions amounted to a criminal offence, c) that criminal charges would be brought, d) that if these charges were withdrawn or altered, those affected by the WEW scheme would be regarded as "victims" and

⁹ (EA/2007/0052)

the Department would communicate with them and e) that Mr Bellamy would fall within that category and receive the explanation he sought.

54. While we accept that the fact the Department is the prosecutor for the purposes of the Fair Trading Act 1973, we have already indicated that it is not a matter for us to decide whether the WEW scheme fell within Part XI of the Fair Trading Act 1973 and amounted to an offence such that there should have been an investigation into prosecuting any particular person(s). We therefore consider that this factor suggested by Mr Bellamy as weighing in favour of disclosure is of little, if any, relevance in this case.

The Public Interest Test: Where does the balance lie?

55. In making section 42 of FOIA a qualified exemption, we accept that Parliament considered that disclosure of information protected by legal professional privilege would only be withheld from disclosure if the public interest balance lies in favour of maintaining the exemption. Having examined each in turn, we do not consider that the factors favouring disclosure carry great weight when applied to the disputed information in the instant case.

56. There is a presumption in favour of disclosure: information falling within section 42 of FOIA must be disclosed unless in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore, even though we consider that the factors favouring disclosure do not carry significant weight in this case, the information must be disclosed unless we consider that the factors in favour of maintaining the exemption are greater.

57. In assessing the factors in favour of maintaining the exemption, we gave significant weight to the in-built public interest in withholding information to which legal professional privilege applies, however, we consider that even if we ignored that factor entirely, the other factors identified, in particular that the legal

advice was recent and was “live” at the relevant time, carry significant weight themselves.

58. In assessing the public interest, we disagree with the Commissioner that the public interest is finely balanced and conclude that, as at the relevant time the legal advice was “live”, the public interest in maintaining the exemption outweighed the public interest in favour of disclosure.

59. The circumstances that lead us to conclude that the legal advice was “live” are as follows. The Department’s own publicity, on its website on 16 July 2001, about the WEW scheme acknowledged that *“legally, these schemes are difficult to crack”* and said that the Government was *“examining all the avenues for protecting the public from this kind of scheme”*. The WEW scheme was of a type known as “chain gifting”. In introducing provisions of the Bill which became the Gambling Act 2005 the Government made it clear that these were intended to put *“an end to chain gifting”*. Mr Bellamy made his request for information on 15 April 2006, a year after the passage of the Gambling Act 2005, but some 15 months before the Act came in to force.

60. At the time of the request, the legal advice was clearly “live”, as the Government was working on the commencement of the Gambling Act 2005, and our reasoning that the public interest considerations in favour of maintaining the exemption outweigh those in favour of disclosure reflects this. Nevertheless, it is incumbent on us to record that, with the passage of time, the considerations may well become more finely balanced, or even tip the other way. However, our decision must relate to the circumstances at the time the request was made.

Conclusion and remedy

61. For the reasons given above we find that the exemption in section 42 of FOIA is engaged and that in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in favour of disclosure.

62. The Tribunal dismisses the appeal for the reasons set out above. The Department was entitled to refuse to provide the disputed information on the basis it was exempt under section 42 of FOIA.

63. Our decision is unanimous.

Other matters

64. While not a matter that has any bearing on the issues we have to decide, we think it appropriate to comment on the inordinate delay by the Commissioner in this case. As detailed above, although the Commissioner informed the Department of the complaint by letter dated 14 September 2006, it appears that no case officer was allocated to this complaint until January 2008. It then took a further eighteen months for the investigation to be concluded; the Decision Notice was not issued until 27 July 2009. There has been no explanation for the delay in taking steps to fulfil the Commissioner's statutory duty under section 50 of FOIA until approximately sixteen months had elapsed since the complaint was made.

65. Concerns have been raised by differently constituted Panels of this Tribunal that such inordinate delays seriously undermine the operation of FOIA. While we are not in a position to identify the cause, or causes, of the delay in this case, we consider that it was excessive and cannot properly be justified by the Commissioner. The delay has meant that this Appeal was not heard until almost four years after the request for information was made. There do not appear to be any effective methods by which Mr Bellamy, or any other Requestor, could challenge the delay by the Commissioner and force him to act in a timely manner. This completely and unacceptably undermines the spirit of FOIA and the general right of public access to information held by public authorities. This great delay also adds an artificiality to our task of considering the public interest as it was at the time of the request.

66. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed

Annabel Pilling
Judge

Date 22 February 2010