Neutral Citation Number [2010] UKFTT 302 (GRC)

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2010/ 0011

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS 50229521
Dated: 10th December, 2009

Appellant:	The Home Office
Respondent:	Information Commissioner
Heard at:	Field House, Bream Buildings
Date of hearing:	24th and 25th May, 2010
Date of decision:	8th June, 2010

Before

D.J. Farrer Q.C.

Judge

and

Marion Saunders

and

Michael Hake

Attendances:

For the Appellant : Alexander Ruck Keene

For the Respondent : Joanne Clement

Subject matter: Right to rely before the Tribunal on exemptions not specified in the Notice of Refusal nor considered in the Information Commissioner`s Decision Notice. Sections 2(2), 17 and 58 of FOIA.

Application of section 40 of FOIA to names of civil servants by and to whom submissions to ministers are sent.

Whether legal professional privilege (s.42) applies to material derived from legal advice and, if it does, whether the public interest favours disclosure.

Ministerial communications: s.35(1)(b) and the convention of collective responsibility

Cases:

***The Department for Business, Enterprise and Regulatory Reform v The Information Commissioner EA*/2007/0072),**
Archer v IC and Salisbury D.C. EA/2007/0037 ,
Home Office and Ministry of Justice v IC EA/2008/0062,
***Home Office and MoJ v Information Commissioner* [2009] EWHC 1611**
DefRA v IC EA/2009/0039,
The Department for Business, Enterprise and Regulatory Reform v IC and Friends of the Earth EA/2009/0072,*], *CPS v Information Commissioner EA/2009/0077
CPS v Information Commissioner EA/2009/0077
Defra v Information Commissioner and Birkett EA/2009/0106
Bowbrick v Information Commissioner EA/2005/0006,
Mitchell v I.C. EA/2005/0002
Kirkaldie v I.C. EA/2006/001
Bellamy v IC EA/2005/0023
DFES v IC EA/2006/0006,
Scotland Office v IC EA/2007/0070;
Dermod O`Brien v IC EA/2008/0011.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal to the extent indicated and substitutes the following decision notice in place of the decision notice dated 10th. December, 2009

SUBSTITUTED DECISION NOTICE

Dated 12th June, 2010

Public authority: The Home Office

Address of Public authority: 2 Marsham Street,
London SW1P 4DF.

Name of Complainant: Mehmet Matthew Habibi

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 10th December, 2010.

Action Required: Within 35 days of publication of this Decision, the Appellant shall disclose to the Requester the following documents, subject to the omissions specified :

Document No. (Closed bundle numbering)	Brief Description	Omissions/Redactions
1	Submission to Home Secretary 1/4/04	All names of civil servants save Colligan, Jupp, Smith, Cavanagh (Special Adviser) Paragraph 4 Paragraphs 8 – 10 Paragraph 11- the words preceding" We would need" Paragraph 14 – 2nd and 3rd sentences Paragraph 15 Paragraph 17 last sentence Annex B Telephone and fax numbers of author
2 3, 5, 6, 10	Letter 8/4/04 Home Secretary to Dep.PM Various	Third paragraph save for last sentence Sixth paragraph 3rd sentence Without redaction

Document No. (Closed bundle numbering)	Brief Description	Omissions/Redactions
4	Letter 26/4/04 Andrew Smith to Dep. PM	Second paragraph 1st sentence
7	Submission 21/6/04 to Baroness Scotland	All names of civil servants save Robey, Darling, Patel, Maclachlan, Siddique, Fish, Cavanagh (Special Adviser). Paragraph 5 2nd and 3rd sentences Paragraph 7 First three sentences. Paragraph 8 Everything before "you may consider" Paragraph 9 The third sentence Paragraph 10 The penultimate sentence Telephone and fax numbers of author
8	Letter June 2004 Andrew Smith to Home Secretary	Final paragraph
9	Letter 7/6/04 Dep.PM to Home Secretary	Paragraph 2 last name Paragraph 4 Fourth to seventh words. The last two sentences.
11	Further Submission 7/7/04 to Baroness Scotland and Annex C	All names of civil servants save Darling, Patel, Williams, Siddique, Fish, Cavanagh (Special Adviser). Telephone and fax numbers of author

Dated this 12th.day of June 2010

Signed D.J. Farrer Q.C.

Judge

REASONS FOR DECISION

Introduction

1. Section 12 of the Asylum and Immigration Act, 2004 abolished the entitlement of successful asylum seekers to back payments of income support. Such repayments were replaced by a system of integration loans.

2. A submission dated 1st. April, 2004 ("the April submission"), dealing with the issues raised by such a reform was drafted by a civil servant for the consideration of the Home Secretary, Mr. David Blunkett. It was circulated to other ministers and to senior civil servants within the Department.

3. Correspondence ensued involving Mr. Blunkett, the Deputy Prime Minister, Mr. John Prescott and other ministers with responsibilities which would be affected by the proposed changes. There were further submissions and draft letters were prepared.

4. Such changes were tabled as government amendments to the Bill which had reached Report stage in the House of Lords. They were debated. The question whether they fulfilled the obligations of the United Kingdom under the Refugee Convention of 1951 was raised and answered. Nothing emerged which revealed the content of the documents at paragraphs 2 and 3, so far as relevant to this appeal.

The request for information

5. The complainant, Mr.Matthew Mehdi Habibi, requested the following information on 29th. July, 2008:

"1 The release of all evidence which the U.K. Border Agency relied upon when section 12 of the Asylum and Immigration (Treatment of Claimants) Act, 2004 was presented to Parliament;

and

2 The mentioned document which justified the decision to introduce section 12 of the 2004 Act.".

6. The "mentioned document" was treated by the Appellant as a reference to the April submission, both in its response to Mr. Habibi and its discussions with the Information Commissioner ("the IC").

7. The Appellant replied on 22nd. August, 2008, stating that it would be unable to respond within 20 days as it required longer to consider the public interest issues under s.35(1)(a) (formulation and development of government policy). On 9th September, 2008, it responded, stating, as to Request 1, that it held the information requested but that, relying on s.12 of FOIA, the cost of compliance with s.1(1)(b) (supply of the requested information) would exceed the £600 limit. This response formed part of the complaint to the IC but the claim to this exemption was upheld by the IC and is not subject to an appeal to the Tribunal. The Appellant refused Request 2, citing s. 35(1)(a), but did not explain how that exemption was said to be engaged nor, if it was engaged, how the Appellant assessed the balance of public interests.

8. Mr. Habibi requested an internal review of this refusal on 9th. September, 2008. The Appellant indicated on 5th. December, 2008 that, following review, its refusal stood.

The complaint to the Information Commissioner**.**

9. As indicated above, the complaint failed in relation to Request 1. As to Request 2, the IC found that s.35(1)(a) was engaged but that the public interest favoured disclosure, which he duly ordered. For reasons that will rapidly become

apparent, we do not need to scrutinise his reasons. He also ruled that the Appellant had breached s.17(1) and 17(5) in failing within the prescribed period of 20 days to give substantive reasons for its refusal of Request 2 or to serve the requisite notice relating to s.12 (Request 1). Neither of these rulings are the subject of appeal. .

The appeal to the Tribunal

10. The Appellant gave notice of appeal on 3rd. January, 2010. It submitted that the IC erred in his assessment of the balance of public interests relevant to the s.35(1)(a) exemption. It further invoked, for the first time, the exemptions provided for by s.40 (protection of personal data) and s.42 (legal professional privilege), indicating an intention to argue that a public authority had a right to rely on appropriate exemptions before the Tribunal, even though it had failed to do so before the issue of the IC`s Decision Notice.

11. The transformation of the appeal did not end there. Following the IC`s decision, the Appellant identified a number of documents, which, it concluded, without conceding any culpable omission, might be within the scope of the Request. The IC agreed to treat them as within the ambit of this appeal. They consisted of eight letters from one minister to another, and two submissions by civil servant to a minister with an attachment. In relation to the letters, the Appellant relied on the qualified exemption provided by s.35(1)(b) (Ministerial communications), s.40(2) and s.42. It claimed the latter two exemptions for only parts of the submissions The IC acknowledged that s. 35(1)(b) was engaged, where invoked, but argued that the public interest favoured disclosure. He rejected in part the claims to the other exemptions. We deal in more detail with the nature of this dispute later in this Decision. We consider that the question of entitlement to raise late exemptions did not arise in relation to this part of the appeal, since it was the information, not the exemption, which arrived late[1].

[1] The position in relation to this information and the claim to an exemption was similar to that in *Bowbrick v Information Commissioner* EA/2005/0006, where the Tribunal distinguished the late reliance on s.42 because it related to material unearthed after the Decision Notice, though in that case the late production was clearly culpable.

12. Finally, before the hearing, the Appellant abandoned reliance on s.35(1)(a) entirely in relation to the submission. Therefore, the only exemptions relied on as justifying the refusal to disclose it or parts of it were those introduced for the first time before us.

The questions for the Tribunal

13. The following issues require determination:

(i) Does the Appellant have a right to rely before this Tribunal on an exemption not invoked before the issue of the Decision Notice?

If not, does the Tribunal have a discretion to admit such late reliance on an exemption?

If it does (and the IC, unsurprisingly, accepted that it did), should that discretion be exercised in favour of permitting reliance on one or both of the “new” exemptions?

If, whether as a matter of right or judicial discretion, the Appellant can rely at this stage on the exemptions enacted in s.40 and/or s.42, are they or either of them engaged and in respect of what parts of the requested information?

If, or to the extent that either or both are engaged, has the Appellant established that the public interest is better served by withholding than by disclosing the relevant information?

As to the additional documents which engage s. 35(1)(b), has the Appellant established that the public interest is better served by withholding than by disclosing the relevant information?

14. A subsidiary issue is dealt with in the brief closed annex to this Decision.

The preliminary issue: Is there a right to raise fresh exemptions before the Tribunal?

15. This is a question of considerable importance, as a matter both of principle and orderly case management. In a series of decisions[2] this Tribunal, variously constituted, has ruled that late reliance on new exemptions[3] may be permitted in the exercise of the Tribunal`s discretion, on a case by case basis, where such reliance is shown to be justified. Reference to some of them will be made later in this section of the Decision. We acknowledge especially the cogent and authoritative expositions of the arguments in favour of such a discretion and against such a right in *CPS v Information Commissioner EA/2009/0077* and *The Department for Business, Enterprise and Regulatory Reform v The Information Commissioner EA*/2007/0072).

16. Contrary to that line of decisions, which are highly persuasive but not binding upon us, we have come to the conclusion that a public authority has a right to raise such exemptions for the first time before the Tribunal. We do not do so lightly and have not found this an easy decision. We have had the advantage of full argument, which, we are told, has not previously been deployed in support of the Appellant`s case. We have also considered further factors not specifically addressed in the submissions of the parties.

[2] See, *The Department for Business, Enterprise and Regulatory Reform v The Information Commissioner EA*/2007/0072), *Archer v IC and Salisbury D.C. EA/2007/003 , Home Office and Ministry of Justice EA/2008/0062, Defra v IC EA/2009/0039, The Department for Business, Enterprise and Regulatory Reform v IC and Friends of the Earth EA/2009/0072, CPS v Information Commissioner EA/2009/0077 Defra v Information Commissioner and Birkett EA/2009/0106* (decision upon preliminary issue). In *Home Office and MoJ v Information Commissioner* [2009] EWHC 1611 (Admin), Blake J. declined an invitation to rule on the issue, where the result of such a ruling was academic.

[3] References to "late reliance" or "late exemption" in this Decision denote reliance on an exemption for the first time after the issue of the Decision Notice.

17. We start from the currently uncontroversial proposition that there is at least a power to allow late reliance[4]. A rigid rule that no exemption could be invoked before the Tribunal if it had not been considered by the IC in the Decision Notice, however plausible the authority`s reasons for failing to invoke it at the right time, whatever interest it was designed to protect and however grave the effect of disclosure upon the public interest, would be potentially highly damaging. As was explained in *Bowbrick v Information Commissioner* EA/2005/0006[5], the requirement in s.17(1)(b) that the authority specify in the refusal notice the exemption(s) on which it is relying does not preclude reliance on further exemptions, at least during the IC`s investigation. The use of the present tense in s.17 (1)(b) allows an authority to say, following the complaint brought under s.50(1), that it now relies on further exemptions. Section 2(2) (exemption from the duty to communicate information) is not dependent on compliance with s.17(1)(b), which is a procedural requirement, breach of which may result in enforcement procedures (ss.52 and 54) but not in exclusion of an applicable exemption.

18. The critical question is whether a public authority must rather than may be permitted to rely on a late exemption, not only by the IC (who has no discretion to disallow such reliance) but, on appeal, by the Tribunal; conversely, does the Tribunal have a power or a duty to entertain such exemptions? It is important to identify factors which discriminate between the two.

19. The Tribunal was created by FOIA 2000 and its powers and functions are enshrined exclusively within sections 57, 58 and 60[6]. It has no inherent powers. Section 58 defines the role of the Tribunal in all cases, save those involving certificates issued pursuant to sections 23 and 24. It provides:

*"**58.** – (1) If on an appeal under section 57 the Tribunal considers-*

[4] Early decisions of the Tribunal might be seen as indicating the contrary – see *Bowbrick v Information Commissioner* EA/2005/0006, *Mitchell v I.C.EA/2005/0002*

[5] The separation of the procedural requirement of s.17 and the substantive duty under s.1 is discussed at paragraphs 41 – 45

[6] S.60 relates to national security appeals and has no bearing on this issue.

> *(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.* (emphasis added)

20. The critical question is whether the Decision Notice "is not in accordance with the law". Does that mean that it reveals an error in the IC`s decision on the exemption(s) relied on in the authority`s notice of refusal (s. 17(1)) or in the course of his investigation before issue of the Decision Notice? That is the construction for which the IC forcefully argued. Or does it have a wider meaning, requiring the Tribunal to consider whether, all material things considered, the Decision Notice has reached the right result – i.e., does its ruling on disclosure give lawful effect to s.1(1)(b) of FOIA, qualified by s.2(2)[7] as applied to this case? Whichever be the correct interpretation, s.58 is framed in mandatory terms, as demonstrated by the underlining in the citation.

21. A fundamental difficulty with the current stance of the Tribunal, as we see it, is that, if the narrow, that is the first, view is correct, there cannot be even a discretion to permit late reliance. On this interpretation, the statute requires the

Tribunal to inspect the Decision Notice and, on the evidence and argument before it, decide whether the IC got it right on the issues that he was called upon to decide. It grants the Tribunal no latitude to consider other exemptions even if they are clearly applicable and required to protect vital interests. It leaves no room for a discretion. Ms. Clement, for the IC, was unable to explain to our satisfaction how there could be a discretion to permit late reliance, if this were the right interpretation, yet submitted that such a discretion existed.

[7] The effect of those provisions is discussed at paragraphs 25 and 26

22. If, as must be the case if the narrow construction is wrong, the wider reading is correct, it is difficult to see how the Tribunal can fulfil its duties under s.58 without reference to an applicable exemption relied on by the authority, albeit for the first time. There is nothing in s.58 or elsewhere to support the claim that it has a choice in the matter. If the task of the Tribunal is to look at the matter more broadly, then there is no room for exercising a discretion; the authority has a right to rely on applicable exemptions and the Tribunal a duty to consider them.

23. We conclude that the wider interpretation, whether or not framed in the precise terms adopted above, is correct. If it is not, the earlier decisions of the Tribunal admitting late exemptions would conflict with the duty under s.58(1) to determine appeals by applying the test enacted in s.58(1)(a).

24. This interpretation does not require the Tribunal, any more than the IC, to seek out further exemptions not relied on by the authority. We respectfully endorse the observations to that effect made at paragraphs 46 and 56 of *Bowbrick.* The Tribunal is a judicial body, not an investigator. To attempt to perform the task of the authority would be an abdication of its judicial function. A judge in a criminal trial has a paramount duty to ensure that an accused receives a fair trial. That involves putting clearly and fairly to a jury any defence or defences that the accused is advancing and, very occasionally, a defence which clearly arises on the evidence but which the accused has omitted or chosen not to raise[8]. He or she is not required to scrutinise the evidence for any further defence that might conceivably have been canvassed. The position of the Tribunal is similar. Section 58(1) (a) must be construed having regard to the Tribunal`s judicial function. Very occasionally, as in *Kirkaldie v I.C. EA/2006/001*, it may correct an error as to which jurisdiction applies or perhaps which exemption, where one of two closely related exemptions may be engaged but that is a different matter.

[8] Specifically provocation on a charge of murder.

25. The argument that this is a question of right rather than judicial discretion is, we think, fortified by a consideration of the familiar provisions of sections 1(1) and 2(2) :

> **1.** - (1) Any person making a request for information to a public authority is entitled-
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
>
> ---
> 2 (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

There is no right to disclosure of information which is designated exempt by any provision of Part II of FOIA. As noted above, that restriction is independent of reliance by the authority on an exemption for the purpose of s.17 or the IC`s investigation. We respectfully adopt the principle set out in *Bowbrick a*t paragraph 61, recognising that this passage referred to the converse possibility that the failings of the authority might adversely prejudice the consideration of its claim:

> *"whether an exemption applies depends on the nature of the information at issue and not on the behaviour of the public authority holding that information. The fact that an authority has failed to discharge its substantive obligations under the FOIA, in terms of identifying and providing information, does not alter the nature of the information it holds and the application of the exemptions must still be considered on the facts of each request."*

It might be argued that, in the case of qualified exemptions, the existence of the exemption depends on a judgement of the public interest, by the authority,

the IC or by the Tribunal. Be that as it may, in the case of absolute exemptions, there can only be one correct view as to whether an exemption applies. The framing of the s.2(2) exception in objective terms tends to indicate that the wider interpretation of s.58(1)(a) is correct and that the Tribunal is bound to consider a late exemption. If FOIA classifies information as exempt, there is no right to disclosure, whether or not the authority cites the exemption in its s.17 notice or in the course of the IC`s investigation.

26. In *CPS v Information Commissioner EA/2009/0077* at paragraph 24, the Tribunal considered this argument and concluded :

> *"b. This means that although s. 2(2) is cast in objective terms, FOIA also makes clear that it is for the IC and, where necessary, the Tribunal to adjudicate on the extent, if any, to which s. 2(2) affects a public authority's duties under s. 1(1).*
>
> *c. In other words, the fact that s. 2(2) is cast in objective terms does not mean that a public authority has an absolute right to make a late claim to an exemption, or that the IC or Tribunal has no power to order disclosure where an exemption - that a public authority has not raised - might in fact apply."*

This analysis raises profound jurisprudential issues as to the nature and origin of rights. It implies that their existence may fluctuate between differing judgments of the IC, the Tribunal and subsequent levels of the High Court. Yet, if the Supreme Court, overruling decisions of the IC and the Tribunal, rules that an exemption applies, then the natural interpretation is that it did so from the outset and subordinate decisions were simply wrong.

27. An important consideration is that s.2(2) confers upon the authority a right to withhold information, where an exemption applies. It does not impose a duty to rely upon it. It is argued that the availability of an exemption which the authority has failed to assert to the IC cannot therefore affect the answer to the question

whether the decision of the IC is "in accordance with the law", even if the wider construction is right. However, that wider construction effectively requires the Tribunal to look at the whole picture as at the date of the hearing, by which time the authority has invoked the exemption. Of course, the point may also be relevant to the argument that, if our conclusion is adopted, the Tribunal could be called upon to seek out exemptions not relied on even before the Tribunal. There is no obligation to consider an exemption that the authority, for whatever reason, does not invoke.

28. Our consideration of the issue is to some extent influenced by the fact that the Tribunal`s appellate function is that of rehearing, not reviewing the decision of a lower court (see e.g., s.58(2)). The IC is not a lower court, even though he is empowered to make binding adjudications. When considering the obligations of the Tribunal confronted by a late exemption, we are not persuaded that analogies with the reviewing role of the Court of Appeal (Civil Division), defined as it is in Part 52 r.11[9] of the Civil Procedure Rules, are apt. The Tribunal routinely sees or hears evidence never considered by the IC, which were therefore never reviewed in the Decision Notice. It entertains arguments not addressed to the IC. A right in the authority to introduce a new exemption at this stage, previously not considered by the IC, as well as fresh factual material

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9 **52.11**

(1) Every appeal will be limited to a review of the decision of the lower court unless –

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive –

(a) oral evidence; or

(b) evidence which was not before the lower court.

(3) The appeal court will allow an appeal where the decision of the lower court was –

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.

(5) At the hearing of the appeal a party may not rely on a matter not contained in his appeal notice unless the appeal court gives permission.

is, to put the matter at its lowest, not incompatible with normal Tribunal procedure.

29. It has been suggested that the recognition of a right to late reliance before the Tribunal would lead to a never – ending opportunity for a feckless or disingenuous authority to keep raising fresh exemptions at every rung of the appellate ladder.[10] The appellate function of the Tribunal is governed by s.58 and particularly the words "not in accordance with the law". That provision does not apply to the appellate jurisdiction of those higher courts that deal with appeals from the decisions of the Tribunal. Section 59 gives a right of appeal from the Tribunal to the High Court "on a point of law". That plainly means a point of law arising from the Tribunal`s decision. Their jurisdiction and willingness to entertain new points of law or fact are subject to different rules, as submitted above. If s.58 requires the Tribunal to entertain late exemptions, that does not apply to those courts.

30. It may be argued (though not a point taken before us), that a right to raise late exemptions conflicts with the fundamental objectives of FOIA and of the Environmental Information Regulations, 2004 ("EIR"), which incorporate the appeal provisions in sections 57 and 58 of FOIA.

31. It is well established that the fundamental objective of FOIA is to create a general right to information subject to exemptions which, if they are said to apply, must be established by the authority that invokes them; furthermore, where competing public interests are to be considered, disclosure will be ordered unless the interest in withholding the information predominates.

32. Still more clearly, Regulation 12(2) of EIR, reflecting Article 4.4 of the Aarhus Convention and Article 4.2 of Council Directive 2003/4/EC, expressly provides for a similar presumption of disclosure.[11]

[10] See eg., *CPS v IC* at para.24e

[11] The Convention and the Directive frame the presumption as a requirement that exceptions be "interpreted in a restrictive way".

33. However, the issue under consideration is one of jurisdiction or procedure, not of substance. Fidelity to the philosophy of these enactments does not of itself justify a refusal to entertain a plausible claim to an exemption because a procedural provision has been breached or because it ought to have been relied on during the IC`s investigation. The presumption is not against late reliance on exceptions but against their application. If there is a right to raise late exemptions, the claims to those exemptions will be subject to the same presumption (where applicable), burden of proof and balancing of public interests as those relied on before issue of the Decision Notice. We respectfully adopt the principle in *Bowbrick a*t paragraph 61 already cited. This is not a case of flouting the spirit of FOIA or EIR but of accepting an authority`s right, at the last stage of the appeal process at which a fresh hearing can be undertaken, to make its case as it sees best in the public interest. The Tribunal will then faithfully apply to its consideration of that case the approach and presumption referred to.

34. A significant problem facing the case for a discretion to allow late exemptions is the lack of any provision appearing to confer it. If it is not expressly provided, it is hard to see why it should be implied. An implied power depends on the necessity of implication to make sense of the enactment. It is difficult to see such a necessity here. Indeed, if the narrow interpretation of s.58(1)(a) is correct, an implied power would be incompatible with the express duty imposed on the Tribunal. Section 58 is framed in mandatory terms. That is consistent with there being neither a power nor a duty to look beyond the Decision Notice but not a discretion whether to do so or not. Put crudely, on the question whether in relation to late reliance there is a duty, a power or neither it is all or nothing and nobody is arguing for nothing.

35. If there is a discretion, on what principles should it be exercised? The principle governing the exercise of such a discretion is said to be *"a reasonable justification for why the exemption was not raised previously"*[12] That, submitted

[12] See *Defra v IC* and *Birkett (op. cit.)at para.29.*The Tribunal proceeded to repeat the need to approach each case on its facts.

Ms. Clement, was the most important consideration. So it is the conduct of the Public Authority that requires scrutiny.

36. FOIA provides exemptions, absolute and qualified, designed to protect a very wide range of interests. Some, though involving indirectly interests external to the authority, are largely those of the authority itself.[13] Others are or may be those of third parties[14]. This group includes several absolute exemptions. A third group[15] protects universal and fundamental public interests clearly going far beyond the narrow concerns of a particular public body, security, defence, law and order, the economy. They include one absolute exemption[16]. It is debatable whether the reasons for the Authority`s earlier failure would be a useful measure for the exercise of discretion where the second or third groups of interests are engaged. Equally, there is no justification for exercising a discretion on the basis that some exemptions are more significant than others. Indeed, it is hard to see any general principle that would guide its exercise. If there is a discretion, there will be many cases where it can only sensibly be exercised in favour of late reliance. That may raise doubts as to whether this is a matter of discretion at all.

37 Ms. Clement submitted that late reliance involved bypassing the scrutiny of the IC when assessing the complaint. That is clearly true but the same applies to evidence introduced for the first time before the Tribunal, when it performs its rehearing function. She argued, justifiably, that it was unsatisfactory for complainants but the same goes for any reliance not specified in the notice under s.17(1).

38. Contrary to the IC`s further submission, the acknowledgement of a right to late reliance is not a charter for the lazy or cynical authority to ignore its obligations under s.17(1)(b) or its duty to cooperate in the IC`s investigation following a complaint under s.50. S. 48 of FOIA (Recommendations as to good practice) and, more directly ss. 52 – 55 (enforcement notices and sanctions for non –

[13] E.g., ss. 22, 32, 34, 35
[14] E,g. ss 40 – 42 and 44
[15] E.g., ss.23, 24, 25, 26, 27, 28, 29, 30, 31
[16] S.23

compliance) enable the IC to take action against a defaulting authority in a particular case or in response to more general unsatisfactory practice.[17] Moreover the Tribunal has power to award costs, specifically pursuant to Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009(as amended), against an authority which belatedly and unreasonably raises exemptions which should have been relied on much earlier and thereby prolongs or even creates an appeal based on a fresh exemption.

39. When considering this preliminary point, we heard submissions on the secondary issue of the exercise of our discretion, should we rule against the Appellant on the primary question. The IC did not resist the exercise of such discretion so far as the s.40 exemption was concerned. As to the s.42 exemption, Ms. Clement argued that no reasonable justification for late reliance had been shown. We agree.

440. Nevertheless, we indicated, after a short adjournment, that, whilst we required more time to consider our decision on the primary issue, if we ruled against the Appellant, we should exercise the discretion, which we would by such a ruling confirm, to permit late reliance on both exemptions in so far as they might apply to the submission. We took that view partly because, even if those exemptions applied, they would require only modest redaction of the April submission which, following abandonment of reliance on s.35(1)(a), would be substantially disclosed without any significant loss of information. As to s.40, we were dealing with the familiar issue of named public servants, hence the protection of personal data of third parties. As to s.42, a further matter, dealt with briefly in the closed annex to this Decision, favoured the admission of this late exemption, regardless of any justification for the earlier failure to invoke it. The fact that the application of these late exemptions proved relatively uncontroversial subsequently confirmed this view.

441. It might be said that such an approach rendered otiose the ruling on the primary issue delivered in this Decision. However, it is an important issue. We received

[17] See further *Bowbrick* at paragraph 64

careful and cogent submissions from both sides and indicated at the outset, that we would rule upon it. We have done so.

442. As indicated at paragraph 11, both s.40 and s.42 were further invoked, together with s.35(1)(b), in relation to the additional material, namely correspondence and related documents produced after the publication of the Decision Notice. For the reason already given, none of these exemptions are late exemptions in relation to that material in the sense that we have used that term.

Evidence

43. Evidence was called by the Appellant consisting of open and closed statements and oral evidence from Tracey Raw, a senior manager in the Refugee Integration and Resettlement Team in the UK Border Agency ('UKBA'), which is an agency of the Home Office and a statement from a senior civil servant, to which we refer in the closed annex.

44. Ms. Raw explained why the additional material had now been disclosed to the IC and that the exemption under s.35(1)(a) was no longer relied on. Dealing with the submission and the additional documents, she gave evidence as to the seniority of various named civil servants and the fact that some were relatively junior and occupied posts in which they would not have direct contact with the public. Her evidence as to the application of s.42 is dealt with in the closed annex. Most importantly, she testified as to the importance of the principle of collective responsibility, in so far as it related to ministerial correspondence. She cited the current Ministerial Code (July 2007):

> " *1* ***MINISTERS OF THE CROWN***
>
> ***- - -***
>
> *1.2 The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law including*

international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life. They are expected to observe the Seven Principles of Public Life set out at annex A, and the following principles of Ministerial conduct:

a. Ministers must uphold the principle of collective responsibility;

- - -

*2 **MINISTERS AND THE GOVERNMENT***

General Principle

2.1 Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.

Cabinet and Ministerial Committee Business

2.2 The business of the Cabinet and Ministerial committees consists in the main of:

a. questions which significantly engage the collectively responsibility of the government because they raise major issues of policy or because they are of critical importance to the public;

b. questions on which there is an unresolved argument between Departments;

Collective Responsibility

2.3 The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Decisions reached by Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasion, it may be desirable to emphasise the importance of a decision by stating specifically that it is a decision of Her Majesty's Government. This, however, is the exception rather than the rule."

45. She further quoted Sir Malcolm Rifkind in a discussion on "Newsnight"

"*Once Government reaches a decision the whole Cabinet must stand behind that decision unless a Minister resigns. Everyone must put aside their own reservations because you have to have*

> *collective responsibility, the Cabinet can't have two policies simultaneously. Now you can not maintain that principle of collective responsibility if it will be immediately or shortly after revealed which Minister said what who was in a majority, who was in a minority. That destroys the authority of Government and that is not in the public interest*."

and opposition support for Jack Straw`s issue of a certificate exempting publication of Cabinet minutes relating to military action in Iraq, based on the same principle.

Submissions of the Parties

46. As to the April submission, the only information on which the IC was required to give a decision, there remained little in dispute, once s.35(1)(a) was abandoned. As to s.40(2), the argument that the disclosure of the names of junior officials who, given the nature of their posts, would not expect to be identified to the public as involved in particular transactions would constitute a breach of the first data protection principle was accepted on both sides. So was its application to the facts of this case.

47. As regards s.42, there is a clear distinction between references to legal advice (which plainly attract privilege) and statements which result from such advice but do not refer to it. The dividing line, however, is not always crystal clear. A statement may not refer to the advice or adviser from which it originates, yet be quite plainly a recitation of that advice rather than a position adopted as a result of it. Such a statement will be privileged, at least when made within the authority. There is no evidence that any part of any legal advice received was disseminated outside the government. The IC conceded the particularly strong public interest attaching to the protection of legal professional privilege[18], whilst reminding us of the interests in transparency and a better understanding of the workings of government. The relatively limited redactions to the submission

[18] See *Bellamy v IC EA/2005/0023*

which the application of this exemption involved clearly strengthened the case that the public interest here lay in favour of withholding the privileged material. So did a matter discussed in the closed annex. We have no doubt that, where the issue arises, the balance of interest lies in the preservation of legal professional privilege in this case.

48. The result is the disclosure of the submission subject to the editing specified in the Substituted Decision Notice. We do not order the disclosure of a draft letter attached to the submission because that letter was sent by the Home Secretary, David Blunkett, to the Deputy Prime Minister and falls to be considered as the first of the additional documents.

49. We turn now to the additional information. As to the application of the s.40(2) and s.42 exemptions, the same principles and, with s.42, the same balance of interests apply as to the submission. Where privilege attaches to passages in these additional documents, we conclude that the public interest favours withholding such information. Whatever our view on the s.35(1)(b) exemption, this material, if disclosed, would therefore be subject to redaction, largely agreed.

50. Section 35(1) provides:

> *"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –*
> *(a) the formulation or development of government policy,*
> *(b) Ministerial communications*
> ….."
>
> By s.35(5), "Ministerial communications" includes any communications between Ministers of the Crown. Section 35 is a qualified exemption, so that disclosure will be ordered unless the public interest is shown to lie in withholding the information.

51. It was agreed that the eight letters to and from Mr. John Prescott, the Deputy Prime Minister, engaged the exemption. They begin with the letter from the

Home Secretary, referred to at paragraph 45, and include exchanges involving other ministers with departmental responsibilities relevant to the proposed enactment. They are copied to further ministers and civil servants. The exemption is not applicable to the further submissions by a civil servant to Baroness Scotland, then leader of the House of Lords (Additional documents 7 and 11 and Annex C).

52. Mr Ruck Keene, for the Appellant, submitted

- that this correspondence clearly involved exchanges between cabinet ministers seeking to reach a collective decision on the problem of back payments of income support;

- that disclosure of these documents would be at odds with the Ministerial Code and the principle of collective responsibility.

- that, even allowing for the passage of time, that principle was of central importance to cabinet government and should be upheld, save in most exceptional circumstances.

- that this was still a current issue and the system of loans, which replaced back payments, was still in force.

- that there remained a danger that frank discussion in cabinet would be inhibited, if ministers believed that their views or disagreements would be publicised, even long after the event.

He acknowledged a proper public interest in transparency and understanding how such decisions are reached in government but argued that it was outweighed by these factors relevant to the principle of collective responsibility.

53. Ms. Clement emphasised:

- the substantial value to the public of an insight into the working of government in this context.

- specifically, that this information helped an understanding of why s.12 was enacted;

- that it demonstrated how and when particular arguments might be deployed by a government introducing legislation

- the importance of .the passage of time and the change of administration.

- that none of the ministers involved were in office when the request was made.

As to the importance of timing, she referred us to *DFES v IC EA/2006/0006, Scotland Office v IC EA/2007/0070* and *Dermod O`Brien v IC EA/2008/0011.*

Conclusion

54. The issue as to s.35(1)(b) is the only significant substantive issue on which we have to rule.

55. We recognise the importance to cabinet government of the principle of collective responsibility, perhaps more important than ever in an administration dependent on coalition. We acknowledge that its preservation is, of itself, a significant public interest.

56. That principle, as the Ministerial Code states, extends beyond the need for a common front on cabinet decisions and embraces the need to maintain confidentiality as to the discussions, divergences and even profound

disagreements that may have been expressed in ministerial exchanges leading up to the decision. That said, s.35(1)(b) provides for a qualified, not an absolute exemption.

57. Like the differently – constituted Tribunals in the appeals cited above, we think that the public has a strong legitimate interest in knowing how such decisions are reached, provided such knowledge does not damage efficient and cohesive government.

58. We regard the passage of over four years from the tabling of the s.12 amendment to the request, together with the wholesale change of administration as significant. We note that Sir Malcolm Rifkind qualified his warning to Newsnight viewers of possible damage to cabinet government by reference to a risk that

"it will be immediately or shortly after revealed which Minister said what . . ."

59. We concede that lapse of time is not the only factor; some ministerial exchanges could be inhibited by the thought that they would ever be revealed, whether by order of the Tribunal or best – selling diary of a former colleague. Each case must be viewed on its own facts.

60. We conclude that the ministerial exchanges revealed in this correspondence relate to an issue of substantial sensitivity and public concern. They are constructive, civilised, mildly informative and of significant, though not overwhelming public interest. Section 12 was enacted some time ago; we do not consider that the delay in its coming into force has real importance. The government to which those ministers belonged is no longer in power and had by the date of the request been superseded by the administration led by Gordon Brown.

61. We are in no doubt that the public interest in withholding this information is limited and is clearly outweighed by the interest in disclosing it.

62. Accordingly, we shall allow this appeal and order that, subject to the specified redactions, the April submission, the subject of the original Decision Notice and Documents 2 – 11 of the closed bundle shall be disclosed.

63. Given the belated appearance of those documents, we think that the right course is to issue a substituted Decision Notice, as was done in rather similar circumstances in *Bowbrick.*

64. Our decision is unanimous

Signed

D.J.Farrer Q.C.
Judge

Date 12th June, 2010

(Amended 06.08.2010)

Tribunals Service
Information Rights

IN THE MATTER OF AN APPEAL FROM THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) TO THE UPPER TRIBUNAL

EA/2010/0011

BETWEEN:

THE INFORMATION COMMISSIONER

Appellant

and

THE HOME OFFICE

Respondent

Reply to an Application dated 2nd.. August, 2010, for permission to appeal to the Upper Chamber

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1 I grant permission to the Applicant to appeal to the Upper Chamber on Ground s 1 and 2.

2 1 grant permission on Ground 2 only because the Upper Chamber should have the opportunity, if it rules in favour of the Applicant on Ground 1, and concludes that the Tribunal has a discretion to permit late reliance on exemptions, to offer guidance as to what principles should govern its exercise.

Signed

David Farrer Q.C.
Judge

Dated 4th August, 2010