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

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0074

BETWEEN:

ANDREW BOUSFIELD

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

HEARD ON 3 OCTOBER 2012 AT THE COMPETITION APPEAL TRIBUNAL, VICTORIA HOUSE, LONDON, WC1A 2EB

BEFORE

DAVID MARKS QC
TRIBUNAL JUDGE

JOHN RANDALL

DAVE SIVERS

Representation:

Appellant in Person

Anneliese Blackwood (of Counsel) for the Information Commissioner

Subject Matter:

Freedom of Information Act 2000, s.42 (Legal Professional Privilege)

Cases authorities and statutes referred to:

Bellamy v Information Commissioner EA/2005/0023
Halsbury's Laws of England: Parliament Vol 78 (2010) 5th ed./9 Privileges of Parliament/(2) Privileges, etc, para 1083

DECISION

The Tribunal dismisses the Appellant's appeal and upholds the Information Commissioner's (the Commissioner) Decision Notice dated 14 March 2012, Ref No. FS50416428.

Reasons for Decision

Background

1. By email dated 8 June 2011, the Appellant wrote to the Liverpool Women's Hospital NHS Foundation Trust (the Trust) in relation to what he described as a number of agreements being 13 in all containing what he called "silencing clauses" in relation to what he again called "the attempt to use a "gagging order" or court injunction against … speaking to his M.P." The reference to a "gagging order" is in effect a shorthand expression with regard to the part of the subject matter of the particular agreements in question with which the Appellant is concerned, as will be explained further below. He sought disclosure of legal advice from a Timothy Pitt-Payne QC on the drafting of a letter for the Trust and made the following request, asking that:

   "… you disclose to me any legal advice received from Mr Pitt-Payne on these issues".

   The Tribunal will refer to the terms of that request as the request.

2. The Trust relied in its response on section 42 of the Freedom of Information Act 2000 (FOIA). It claimed, as the exemption in that section stipulates, that the information held fell within the scope of the exemption attracting as it did legal professional privilege. Moreover, it claimed that the public interest lay in favour of maintaining the exemption. The Appellant complained to the Commissioner on or about 15 September 2011.

3. The Commissioner issued his Decision Notice dated 14 March 2012. Put briefly, he held that the Trust correctly applied section 42 to the requested information and that the public interest lay in favour of maintaining the exemption.

4. The 13 agreements referred to various agreements entered into between the Trust and clinicians between 1998 and 2008. The public authority, as well as the Commissioner, therefore took the view, and in the case of the Commissioner, duly determined, that the information in question was legal advice provided by Mr Pitt-Payne to the Trust, albeit via the Trust's solicitors, in relation to confidentiality clauses contained within those agreements and the drafting of letters relating thereto.

5. The submissions of the Appellant referred frequently to one named individual, who is one of the 13 people who had entered into a compromise agreement. As that person is not a party to these proceedings, the Tribunal will refer to him only as Mr X.

Section 42

6. In relevant part, section 42 of FOIA provides:

> "… Information in respect of which a claim to legal professional privilege … could be maintained in legal proceedings is exempt information".

7. As indicated already, the disputed information comprises legal opinion and advice provided to the Trust by a professional legal adviser on or relating to the issue of compromise agreements.

8. It is well established and apparently not in dispute in this case that legal advice privilege, which is the type of privilege here in issue entails the following three basic requirements. First, the communication must be between a professional legal adviser and the client; secondly, the communication must be made for the sole or dominant purpose of obtaining legal advice and, thirdly and finally, the information should be communicated in a legal adviser's professional capacity. Enough has been said already to show that these requirements are entirely satisfied in the present case.

9. As will be seen however, the Appellant contends that the disputed information is contained in the context of communications which were entered into with an ulterior purpose and arguably a criminal purpose, namely to act or cause a person or persons to act, in contempt of Parliament.

10. The Commissioner accepts and the Tribunal would in general agree, that there is no such privilege of the type described above if exchanges or communications are made for the purposes of committing a crime or a fraud irrespective of whether the intention are that of the person holding the documents or any other person. The fact remains that in any given case, there would need to be a clear showing that the communications in question here constituting the disputed information is made for such a purpose or purposes: see generally Phipson on Evidence (17th ed.) at para 26-74.

11. For present purposes, again, the Tribunal accepts, as does the Commissioner, that any act or omission which obstructs or impedes either House in the performance of its functions, or any act or omission which obstructs or impedes any member or officer of the House in the discharge of his or her duty, or which might have a tendency to produce such a result, might be treated as a contempt of Parliament even if there were no precedent for the offence. Reference is made for this purpose

to the Report of the Select Committee on the Official Secrets Acts (HC Paper 101 (1938-39)) p.xii. However, the Commissioner drew the attention of the Tribunal to an extract from Halsbury's Laws of England: Vol 78 (2012)/9 Privileges of Parliament, etc. /(2) Privileges, etc. claimed, etc., para 1083. Contempts, which states:

"In deciding whether or not to proceed against a person in regard to whom a charge of contempt has been made, the House of Commons has particular regard to its resolution of February 1978 that such action should be taken only when the House is satisfied that to do so is essential in the interests of reasonable protection against improper obstruction causing or likely to cause substantial interference with its functions."

The bar is thus set relatively high.

The Appellant's Grounds of Appeal

12. In his original Notice of Appeal dated 29 March 2012, the Appellant sets out his grounds in 10 numbered paragraphs. These grounds have to some extent been revisited and it could be said amplified later. However, it is important in the Tribunal's view to set out what could be regarded as the significant passages.

13. In paragraph 1, the Appellant claims that the "basic" ground of appeal comprises "a fundamental failure to consider the evidence in relation to the Parliament and its wish to prosecute Mr Pitt-Payne for contempt of Parliament." Paragraph 1 goes on to say that the matter "has been before the Privileges and Standards Committee of the House and has been raised with the speaker in writing and in meetings by Sir Peter Bottomley, MP". The same paragraph goes on to say that the evidence was put before the Commissioner and that the Appellant received a telephone assurance from the Commissioner's office that it would be considered. Complaint is then made that the judgment, i.e. the Decision Notice, contained no reference to the evidence and according to the Appellant, "It seems likely that it was both not considered and not understood".

14. In paragraph 2 and following, the Appellant explains that the case involves the legal advice of Mr Pitt-Payne QC. In particular, in the words of the Appellant "It involves an agreement to silence a senior consultant and former Medical Director, namely, Mr X, which breached both Health Service Circular 1999/198 (which seeks to prohibit gagging clauses) and the Public Interest Disclosure Act (section 43J makes any gagging clause void if it prevents a protected disclosure)". The Tribunal notes that the Circular does not have any direct legislative force or effect.

15. In paragraph 3 of his Grounds of Appeal, the Appellant claims that when Mr X stated he wished to raise certain concerns with a Member of Parliament or perhaps with more than one Member of Parliament "Mr Pitt-Payne then drafted a letter which threatened [Mr X] with an injunction if he communicated with MP's (sic)". The Appellant then says that when he complained, Mr Pitt-Payne "attempted to hide behind the legal privilege as to whether he had in fact drafted the injunction threat".

16. It appears that the matter then went before the Bar Standards Board during which proceeding it is said that Mr Pitt-Payne "admitted drafting this threatening letter". However the Board later dismissed all complaints against Mr Pitt-Payne.

17. The Appellant therefore confirms that the request is for disclosure of "any other related advice of Mr Pitt-Payne and whether he understood his actions were a contempt of Parliament at the time". The Appellant then quoted from the letter from Sir Peter Bottomley MP to the Bar Standards Board on 11 August, containing the following passage, namely:

"Essentially and simply: I put to the Standards Board that no barrister writing or drafting such a warning, whether or not in reference to a compromise agreement, can be held to have demonstrated the professional attitude or behaviour required and that a complaint would be upheld, always, if it were demonstrated or admitted that the barrister had been involved in such a warning or threat or action."

18. The Appellant then goes on to refer to a further letter sent by Sir Peter Bottomley, it seems, to the Complaints Committee of the Bar Standards Board on 5 March 2012 in which Sir Peter wrote: "It is beyond me why a professional standards body requires action in or by Parliament before it can consider inappropriate behaviour to be inappropriate. I shall have discussions here."

19. The Appellant then turns to the underlying reason as to why an injunction was, as he claims, threatened against Mr X. The Trust is now, according to the Appellant, subject to a £20m negligence claim with many women having being harmed in surgery. This, he claims, is the second largest class action in NHS history "and the harm and loss could have been prevented if a senior doctor had been able to communication with MP's (sic)".

20. In paragraph 7, mindful of the fact that his Grounds of Appeal are dated 10 April 2012, he states in terms: "The matter is now being investigated by Parliament". In paragraph 10 he claims that further details of the skeleton argument are to be filed at the subsequent stage "including details of the offence of contempt of Parliament …".

21. The Tribunal pauses here to note that it has been provided with a written statement from Mr X apparently dated 4 July 2012, but addressed on its face to the Appellant himself, setting out the circumstances of Mr X's dispute with and departure from the Trust. That exchange is then provided by way of witness statement, albeit unsigned, but dated 4 July 2012.

22. In relevant part the statement provided by Mr X states the following:

> "… I was bullied into submission and acceptance by the legal threat which was issued. I realised that as an individual I would have to fight an organisation with comparatively endless resources – which their legal representative was only happy to continue accepting regardless of any issues of propriety or variety. Any consideration of the "Rights or Wrongs" was simply steam-rollered into oblivion – a practice that has so far been condoned by the regulatory authorities. I cannot emphasise enough how the receipt of this threat left me feeling dejected, vulnerable and utterly humiliated. The law was just not colluding with an exercise which was aimed at supressing material which was aimed at protecting health care – but was actively encouraging this exercise whilst presumably continuing to charge significant fees from the public purse. While this practice goes uncorrected there continues to be a stain on the character of the legal bodies involved."

The Decision Notice

23. The relevant Notice has already been referred to. At paragraph 15, the Commissioner deals with the public interest arguments in favour of disclosure. He states in round terms that there is clearly an interest in creating greater transparency in the workings of the Trust. He also acknowledges that there has been "some general and political interest in the subject of whistle blowing in the NHS". He then refers specifically to a session held on 7 December 2011 by a Health Select Committee on "Professional responsibility of health care practitioners".

24. However, from paragraph 17 onwards, he then deals with the public interest arguments in favour of maintaining the exemption. These, he says, comprise "clearly a very strong and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence". He adds that a disclosure of advice in those circumstances would "potentially undermine the client's position in any legal dispute with [sic] arose". This would, he said, prevent clients from being able to seek full and frank advice in the first instance. Finally, he pointed out that the Trust had explained that the "legal advice it received relates to an issue which is still relevant and live".

25. At paragraph 20 and following, the Commissioner summed up his conclusions in determining that the public interest lay in favour of maintaining the exemption. These consisted principally in accepting the Trust's argument that it should be able to obtain free and frank legal advice so that it was fully informed of all relevant legal issues before decisions were made. Reference is made to the earlier Tribunal decision in *Bellamy v Information Commissioner* EA/2005/0023. In that case, the Tribunal indicated there was "a strong element of public interest inbuilt into the privilege itself". Therefore, in the Commissioner's view, none of the arguments mentioned in favour of disclosure outweighed the inherent public interest in maintaining the exemption.

Further Submissions

26. By a further set of written submissions dated 22 May 2012, the Appellant submitted what he described as "Requester's Reply". The stated purpose was to update the Tribunal with what he called "the procedures within Parliament against Mr Pitt-Payne QC for contempt of Parliament". He annexed several emails to his document.

27. At paragraph 2 of this document, he admitted that following a letter sent to him on 1 May 2012 by the Commissioner, he was "unable to provide the documents [with respect to the Speaker of the House and the Standards and Privileges Committee] without appropriate consent". Later he confirmed that "at present, the matter is with legal counsel to the Speaker and there is discussion on the best way to proceed to have the case expeditiously heard by the Standards and Privileges Committee."

28. At paragraph 4, the Appellant claims that it is "clear to several Members of the House [that]… Mr Pitt-Payne's letter to [Mr X] of 22 November 2007 was a contempt of Parliament". At paragraph 5 he says that he would wish to see "whether Mr Pitt-Payne discussed the risks of committing contempt of Parliament". He claims that in a later document sent to the Health Care Commission, the Trust "admitted it would not be in the public interest to bring injunction proceedings against Mr X for wishing to speak to local members of Parliament." He claims that he would like to know why advice to this effect was not given at an earlier stage.

29. The Tribunal feels that it is entirely safe to state that nothing in the attached emails throws any light on the present or indeed any prior status, if any, of any proceedings for contempt of Parliament against Mr Pitt-Payne, at least as at 22 May 2012. The only exception to this is an email from the Appellant himself to the Commissioner's office dated 1 May 2012 in which the Appellant states the following, namely:

"Sir Peter Bottomley referred the matter to the named authorities in February this year, after further correspondence discussion with the BSB [Bar Standards Board] following their decision in August 2011. I would, of course, require Sir Peter's

consent for those matters to be disclosed to you, but this is an important matter, and I am sure his consent will be forthcoming." The email ends with promising the Commissioner that he, the Appellant, would be in touch in the near future after speaking to Sir Peter Bottomley.

The Commissioner's Response

30. Given the fact that the Appellant accepts that section 42 of FOIA is engaged, the Tribunal is of the view that it is only necessary in such circumstances to refer to those parts of the Commissioner's formal response dated 8 May 2012 which address the issue of public interest.

31. Perhaps not surprisingly, the Commissioner reiterates in his response the fact that there was a strong element of public interest inbuilt in the exemption of section 42 "there being a very strong and well-reasoned public interest allowing clients to seek full and frank advice from their legal advisers in confidence". Furthermore, the advice related as the Decision Notice itself made clear to two matters or issues which were still relevant and live.

32. The Commissioner then takes issue with the Appellant's further and specific contention, in particular as articulated in paragraph 8 of his Grounds of Appeal that "it is not for the Information Commissioner to apply an exemption that prevents Parliament from having full information about an offence committed against Parliament." The Commissioner states not only that he is unable to understand that contention that has been put forward, but also that he, as the Information Commissioner, is in the Commissioner's own words not "preventing Parliament from having access to any information".

More Recent Developments

33. In yet further submissions provided to the Appellant in the period leading up to the hearing of the present appeal, the Appellant provided a copy of a further email from Sir Peter Bottomley, sent among others to the Appellant and to Mr X. The Tribunal sees nothing further from that exchange which in any way suggests, let alone states, that there has been any form of formal complaint or charge, whether by way of contempt of Parliament against Mr Pitt-Payne since the matters referred to above. All that Sir Peter Bottomley states is that he intends "to see if I can get the House to consider the general issue, going farther than just the Bar".

34. The Appellant provided also an email exchange between Sir Peter Bottomley MP and the Clerk to the House of Commons, Mr Robert Rogers. In responding to Sir Peter, Mr Rogers stated: "If a contempt of the House is alleged, it would be a for a Member

if he or she wished, to follow the normal procedure and to write to the Speaker. Such a thing is of course for the jurisdiction of the House and for no other body. But (so far as one can tell from the correspondence) in this case criticism is being made of action (or inaction) partly on the basis of an *allegation* of contempt or *supposed* contempt. As no contempt is shown unless and until the House finds it so, this is a horse that will not run."

35. With regard to the subject matter of the request itself and by letter dated 13 July 2012 addressed to the Appellant, the Trust stated the following, namely:

"As I understand it, the present request is for disclosure of copies of any correspondence between Mr Pitt-Payne and the Trust or Mr Pitt-Payne and Hill Dickinson arising out of your FOI request of 8th June 2011. I can confirm that the Trust does not hold such information. The Trust did not write to or receive any correspondence from Mr Pitt-Payne in connection with the 8th June 2011 request. Hill Dickinson (although not subject to the Freedom of Information Act) have, nevertheless, confirmed that they did not write to or receive any correspondence from Mr Pitt-Payne in connection with the 8th June 2011 request or otherwise."

The Tribunal's Conclusions

36. Despite the clear general public importance of the underlying issues which have been raised by the Appellant relating to the inappropriate use of gagging clauses in the context of severance and other similar agreements entered into between medical practitioners and others on the one hand and NHS Trusts on the other, the Tribunal is firmly of the view that such issues have nothing to do with the relatively straightforward issue on the appeal of whether there was a criminal intent which rendered void the privilege normally attaching to legal advice.

37. Section 42 is clearly engaged by common consent. In the circumstances, the Commissioner and the Tribunal need only address the competing public interests, if any.

38. The Tribunal feels it cannot improve upon the short and concise manner in which the Commissioner addressed the relevant balancing test in his Decision Notice. Put shortly, although there was great importance in ensuring that the requisite transparency was safeguarded, the fact remained, and the fact remains, that section 42 contains a strong inbuilt public interest, at least in cases where legal advice is provided in confidence and in circumstances when the issues or issue covered is or are relevant and live.

39. However, of particular importance in this case is that despite the Appellant maintaining that the conduct of the principal lawyer involved, namely Mr Pitt-Payne QC, was in some ways unlawful, and in particular, constituted a contempt of Parliament, the fact remains that there is simply no evidence of any such conduct on his part, let alone any finding to that effect. A complaint lodged before the Bar Standards Board was dismissed. The Clerk of the House of Commons dismissed the claim that a contempt had or has been committed as a "horse that will not run" as indicated above. In the circumstances, it is impossible to see what aspect of his professional behaviour as related to the facts of this case can in any way be said to intrude upon, let alone influence the public interest balancing test referred to above as determined in the event by the Commissioner and as upheld by the Tribunal in its judgment.

Signed **David Marks QC**
Judge

Dated:16th October 2012