Appeal number: EA/2018/0177

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

EDWARD WILLIAMS **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondents**
THE ATTORNEY GENERAL'S OFFICE

TRIBUNAL: JUDGE ALISON MCKENNA
Mr STEPHEN SHAW
Mr DAVE SIVERS

Determined on the papers, the Tribunal sitting in Chambers on 1 August 2019 and re-convening on 14 October 2019 to consider additional submissions from the parties.

DECISION

1. The appeal is allowed in part.

2. The Tribunal finds that the Decision Notice of 17 August 2018 is in accordance with the law save in respect of one category of information and makes a substituted Decision Notice as follows.

3. The three signed "Fiats" are not exempt from disclosure under s. 42 (1) FOIA as the Decision Notice found. These three documents (only) (pages 477, 848 and 849 of the closed bundle) must be disclosed to the Appellant within 28 days.

4. The AGO may redact the Fiats in respect of any personal data they contain prior to disclosure.

REASONS

Background to Appeal

5. Paul Golding, the leader of the Britain First Party, and Jayda Fransen its deputy leader, were prosecuted for offences contrary to s. 1 of the Public Order Act 1936, which prohibits the wearing in a public place of a "*uniform signifying …association with any political organisation or with the promotion of any political object…".* The consent of the Attorney General is required to bring such a prosecution.

6. Ms Fransen was convicted of an offence under s. 1 of the 1936 Act on 3 November 2016. Mr Golding was convicted of an offence under s. 1 of the 1936 Act on 5 January 2015 and again on 1 August 2016. Those prosecutions were necessarily authorised by the Attorney General or Solicitor General.

7. The Appellant made an information request to the Attorney General's Office ("AGO") on 6 March 2018 in the following terms:

> "*Dear Sir,*
>
> *Public Order Act 1936, section 1(2)*
>
> *Please e mails all records held, relating to or concerned with, the decision of A-G to allow the prosecutions of Paul Golding (leader Britain First party) and Jayda Fransen (deputy leader) to proceed.*
>
> *This must include, but not be limited to, legal advice given to the A-G in any form.*

*This is not exempt as the AG was never a **party** to the adversarial proceedings. The AG is was not a prosecutor nor defendant.*

In the event that this request goes over the cost threshold, the please just supply the Fransen records."

8. The AGO confirmed that it held information relating to five applications for the AG's consent to prosecute. However, it refused to disclose the information requested on 28 March 2018, in reliance upon sections 30 (1) (a) and 42 (1) of the Freedom of Information Act 2000 ("FOIA"). This response was confirmed on internal review on 26 April 2018. The Appellant complained to the Information Commissioner.

9. The Information Commissioner carried out an investigation which included consideration of the withheld information. She issued Decision Notice FS50741639 on 17 August 2018, upholding the AGO's position in relation to s. 42 (1) FOIA and not finding it necessary to determine the application of s. 30 (1) (a) FOIA. She required no steps to be taken.

10. The Decision Notice describes the withheld information at paragraph 9 as comprising:

"…submissions prepared by legal advisers to the Law Officers (including selected attachments), signed Fiats, correspondence between the Attorney General's Office and the Crown Prosecution service and the CPS' applications for consent."

11. The Decision Notice explains at paragraphs 14 and 15 that in order to obtain the AG's consent, a lawyer at the CPS prepares an application which is considered by a legal adviser to the Law Officers. That legal officer then provides legal advice to the Law Officers on whether the evidential test is met and whether it is in the public interest to prosecute. If consent is given, a Law Officer will sign a "Fiat" which gives permission to the CPS to prosecute. The Decision Notice concluded at paragraphs 16 and 27 that the documentation involved in the process described was subject to legal professional privilege (specifically litigation privilege) so that s. 42 (1) FOIA was engaged. The Decision Notice considered the public interest arguments in favour of disclosure and against at paragraphs 17 to 23, and concluded that the complainant had not submitted clear, compelling or specific justification to equal the strong public interest in protecting the withheld information. The Appellant appealed to the Tribunal.

Appeal to the Tribunal

12. The Appellant's Notice of Appeal, dated the same day as the Decision Notice, relied on grounds that: (i) the exemption under s. 42(1) FOIA was wrongly applied to the requested information; (ii) that the public interest requires disclosure of the requested information; (iii) that the Information Commissioner's investigation had focussed on the legal advice given to the AG, but the scope of the request included the application by the prosecution to the AG; (iv) the Information Commissioner had demonstrated political bias through the terms in which she described Paul Golding

and Jayda Fransen, and the inclusion of information about them which was irrelevant to this information request.

13. The Information Commissioner's Response, dated 17 September 2018, resisted the appeal and maintained the analysis as set out in the Decision Notice. In making more detailed submissions about legal professional privilege, the Information Commissioner submitted that litigation privilege relates to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Further, whilst the communications must be made between a legal adviser and their client, the privilege extends to communications with third parties, provided the dominant purpose of the communication is to assist with the preparation of a legal case.

14. Responding to the Appellant's grounds of appeal, the Information Commissioner submitted that: grounds (i) and (ii) do not disturb the correct conclusions in the Decision Notice; ground (iii) is misconceived because the Decision Notice makes clear the scope of the information considered to be within the scope of the request; ground (iv) is firmly refuted.

15. The Appellant's Reply to the Information Commissioner disputed that legal professional privilege was engaged in the circumstances of this case. He questioned the legal qualifications of anyone involved in preparing advice to the AG and suggested that the AG should file a witness statement. He also queried why a Fiat signed by the AG would be subject to legal professional privilege. He submitted that a signed Fiat would fall outside the scope of his information request as it is not "advice", but an order.

16. The Tribunal joined the AGO as a party to the appeal. The AGO's Response, dated 26 November 2018, agreed with the Information Commissioner that legal professional privilege attaches to communications with third parties where communication is made for the conduct of preparation of litigation involving the solicitor's own client. In this case, it was submitted that the dominant purpose of the information within the scope of the request was to provide legal advice on prospective litigation i.e. the proposed prosecution. The attachments to the CPS request for the AG's consent to prosecution had been assembled by lawyers and the submission itself was prepared by lawyers with the intention of assisting the AG's legal adviser in giving advice to his or her client. It was submitted that the withheld information was, on this basis, subject to legal professional privilege notwithstanding the fact that the AG was not a party to the proposed proceedings. It was submitted that if the Tribunal did not accept that litigation privilege attached to the withheld information then advice privilege should be considered to be attached. The AGO concurred with the Decision Notice's conclusions in relation to the engagement of s. 42 (1) FOIA and the public interest balance. It also sought to rely on s. 30 (1) (a) FOIA, which had been relied on initially but not been determined by the Information Commissioner and also claimed reliance, for the first time, on s. 40 FOIA.

17. The Information Commissioner, with the permission of the Tribunal, made a further submission dated 4 January 2019, in reply to the AGO and the Appellant's

submissions. It was submitted that the Tribunal should consider only the exemption at s. 42 (1) FOIA in this appeal, as the applicability of the further exemptions relied on by the AGO was academic.

18. The Information Commissioner agreed with the AGO's submission that the AG was necessarily involved in the proceedings to which the withheld information related, so that legal professional privilege applied to communications with his legal advisers. It was submitted that the entirety of the disputed information related to the contemplated litigation, notwithstanding the fact that it does not consist of legal advice only. The Information Commissioner expressed some reservations as to the claimed reliance on advice privilege, unless more background about the relationship between the CPS and the AGO information was given.

19. The AGO made final submissions on 29 March 2019. These concerned the claimed engagement of legal advice privilege and submissions as to the common interest of the CPS and AGO in the proceedings. It was also submitted that the CPS disclosed information confidentially to the AGO for these purposes, by virtue of its obligations under the Data Protection Act 2018, GDPR, Article 8 ECHR and the common law duty of confidentiality.

20. The Appellant made a number of further submissions, as follows. He disputed the engagement of s. 31 (1) (a) and s. 40 FOIA. Whilst he conceded that advice provided by a lawyer to the AG attracted legal professional privilege, he disputed that information provided by the CPS to the AG attracted legal professional privilege because the CPS does not provide legal advice to the AG. He submitted that the Tribunal should apply legal professional privilege to confidential communications between lawyers and clients only, so that information consisting of applications, Fiats and correspondence cannot engage s. 42 (1) FOIA. He submitted that the Magistrates' Court could not withhold disclosure of a Fiat to the defence because it is necessary to establish that consent to the prosecution has been given.

21. The Appellant sought to distinguish the Upper Tribunal's Decision in *Savic* (see paragraph 33 below) on the basis that the AG could not be a litigant in the particular proceedings with which the withheld information was concerned. He submitted that the public interest balancing test should be decided in favour of disclosure so as to *promote transparency, accountability, public confidence, public understanding, the effective exercise of democratic rights, and other related public goods,* quoting from *Evans v IC* [2012] UKUT 313 (AAC). He further submitted that there would be no prejudice to any person arising from disclosure of the requested information; the information requested was stale at the time of the request; disclosure would answer some important questions about the impartiality or otherwise of the AG, given that he is a political figure; that the scope of s. 1 of the 1936 Act should be clarified so that members of the public can understand what constitutes a 'political uniform'; that the public interest favoured disclosure in the interests of open justice; that the standard of the AG's decisions would be enhanced by public scrutiny; and that disclosure would inform public debate.

22. In the Appellant's final submission of 2 April 2019, he submitted that information relating to the AG's refusal to consent to a prosecution should also be regarded as falling within the scope of his information request, as it is caught by the wording *…" relating to…".* He disputed the AGO's claimed 'common interest' in respect of advice privilege and submitted that the public interest favoured disclosure so that the public can know the AG's views on the unbroken line of ECtHR judgments as to the wearing of items of political symbolism and Article 10 ECHR rights. In a final paragraph entitled "*Why I Should Win*" he submitted that disclosure was in the public interest so that individuals could regulate their conduct so as to avoid committing an offence under s. 1 of the 1936 Act.

23. The parties each responded to the Tribunal's request for further submissions as to the status of the three signed Fiats, given that they would have been referred to in open court during the prosecutions which they authorised. The Information Commissioner submitted that the principles of open justice, recently described by the Supreme Court in *Cape Intermediate Holdings v Dring* [2019] UKSC 38, should in principle be applied to these documents. However, she submitted that it was beyond the scope of the Decision Notice to have determined whether such disclosure should have taken place outside the provisions of FOIA. Nevertheless, having considered the matter further, the Information Commissioner no longer wished to rely on the engagement of s. 42 (1) FOIA in respect of the signed Fiats because, as it was self-evident that the Fiats were signed because the prosecutions ensued, the signed Fiats no longer held the quality of confidence necessary to attract legal professional privilege.

24. The AGO submitted that there was no entitlement to disclosure of the signed Fiats under open justice principles, and the Magistrates Court would have had to make a decision on any application for disclosure. It was submitted that it was questionable how disclosure of a signed Fiat in relation to a concluded prosecution would advance the principle of open justice and that if a signed Fiat contained personal information it ought to be redacted prior to disclosure.

25. The Appellant agreed with the Information Commissioner that disclosure outside of FOIA was beyond the scope of a Decision Notice. He did not comment on her abandonment of s. 42 (1) in respect of the signed Fiats but repeated his contention that the Decision Notice was not in accordance with the law.

Mode of Determination

26. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising over 200 pages, and a closed bundle of over 850 pages plus DVDs of video evidence.

27. Having convened to determine the Appellant's appeal on 1 August 2019, we decided to seek the parties' further submissions on one additional matter. This was, in short, whether the signed Fiats relied on in open court for the purposes of a

prosecution, were disclosable outside of FOIA in accordance with the principles of open justice. We have considered carefully all the parties' submissions on this issue before reaching our final conclusions.

28. As noted above, we have considered a closed bundle which contains the withheld information and documents which are revelatory of it. This has not been disclosed to the Appellant. We have not found it necessary to create a closed annexe to this Decision as our reasons may fairly be given in an open Decision.

The Law

29. Section 42 (1) FOIA[1] provides that:

> *42 Legal professional privilege.*
> (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.

30. Section 42 (1) falls into the class of exemptions to which s. 2(2) (b) FOIA[2] applies, as follows:

> *(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.*

31. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA[3], as follows:

> *"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,*

[1] http://www.legislation.gov.uk/ukpga/2000/36/section/42

[2] http://www.legislation.gov.uk/ukpga/2000/36/section/2

[3] http://www.legislation.gov.uk/ukpga/2000/36/section/58

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."

32. We note that considerable weight is to be afforded to a decision of a Three Judge Panel of the Upper Tribunal[4]. In *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC)[5], a Three-Judge Panel of the Upper Tribunal chaired by the then-Senior President of Tribunals underlined the importance of the system of legal professional privilege to a fair and proper judicial process. The Upper Tribunal considered in *DCLG* that weight should be attributed not only to the need to maintain legal professional privilege in that case but also to the more generalised risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of the system of legal professional privilege.

33. We were referred to the Upper Tribunal's Decision in *Savic v IC, AGO and CO* [2016] UKUT 534 (AAC)[6], in which the Upper Tribunal concluded at paragraph 35 that:

"…*if the information sought under FOIA is relevant to, or might be or might have been of use in, existing, concluded or contemplated legal proceedings this adds to the weight of the factors against disclosure because, although FOIA is applicant and motive blind, the disclosure would effectively deny the public authority to whom the FOIA request is directed its right as a litigant in proceedings to refuse disclosure and so cause damage to the manner in which proceedings are, have been or might be conducted, and thus to the administration of justice".*

34. We were referred by both Respondents to the judgment of Mr Justice Moore-Bick in *United States of America v Philip Morris Inc* [2003] EWHC 3028[7], as follows:

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[4] *Dorset Healthcare NHS Trust v MH* [2009] UKUT 4 (AAC) at paragraphs 36 and 37, http://administrativeappeals.decisions.tribunals.gov.uk//Aspx/view.aspx?id=2607

[5] http://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3477

[6] https://www.gov.uk/administrative-appeals-tribunal-decisions/savic-v-the-information-commissioner-and-others-2016-ukut-0534-aac

[7] https://www.bailii.org/ew/cases/EWHC/Comm/2003/3028.html

40. I turn next to the question of litigation privilege. Miss Dohmann submitted that all communications that passed between Mr. Foyle and employees of the BAT group (or indeed anyone else) relating to tobacco litigation are covered by litigation privilege. In this case two requirements must be satisfied: (i) the communication must be confidential; and (ii) it must have been made for the dominant purpose of conducting or giving advice in relation to litigation, either pending or in contemplation.

41. Miss Dohmann and Mr. Hapgood submitted that all the communications between Mr. Foyle and BATCo (and indeed other companies in the group) were confidential and were made in contemplation of litigation. Mr. MacLean submitted, however, that when Lovells were first instructed, and indeed for much of the period during which Mr. Foyle was advising BATCo, no litigation had been commenced against it or even threatened. One question that arises for decision at this stage, therefore, is the extent to which litigation must be in contemplation in order to claim privilege in respect of confidential communications.

42. The leading authority on litigation privilege is *Waugh v British Railways Board* [1980] AC 521. The House of Lords was not directly concerned in that case with the likelihood of litigation, but Lord Simon and Lord Edmund Davies referred with approval to a passage in the judgment of Barwick C.J. in the High Court of Australia in *Grant v Down*s (1976) 135 C.L.R. 674 in which he referred to documents produced at a time when litigation was 'in reasonable prospect'. Subsequently in *Re Highgrade Traders* [1984] B.C.L.C. 151 the Court of Appeal, having considered a number of earlier authorities including *Waugh v British Railways Board*, held that litigation privilege may be claimed in respect of documents brought into being at a time when litigation is reasonably in prospect: see per Oliver L.J. at page 172. That test has been applied in many subsequent cases.

…

48. As to Miss Dohmann's second argument, it is clear from the authorities that the justification for litigation privilege lies in the adversarial nature of legal proceedings: see *In re L (a Minor) (Police Investigation: Privilege)* [1997] A.C. 16. An application by one party to legal proceedings against a person who is not a party to those proceedings to compel him to give evidence or to produce documents is in my view essentially adversarial in nature. It follows that confidential communications between a solicitor and his client or a third party for the dominant purpose of considering, preparing or conducting a defence to such an application are covered by litigation privilege. It does not necessarily follow, however, that all communications relating to an application of that kind necessarily fall to be treated in the same way. The fact that disclosure is required for the purposes of litigation between third parties would not of itself be sufficient in my view to attract litigation privilege; what is required is that the communications be made for the preparation or conduct of litigation involving the solicitor's own client…."

35. Finally, we note here that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Conclusion

36. In reaching our conclusions, we remind ourselves first of the precise terms of the information request (see paragraph 7 above). We note that it is a request for *all records held, relating to or concerned with, the decision of A-G to allow the prosecutions….* It does not seem to us, on a plain reading of the request, that information held which concerns or relates to a decision of the AG not to allow a prosecution is therefore within the scope of the request. To that extent, we disagree with the Appellant's submissions recorded at paragraphs 15 and 22 above. We note

that the Decision Notice did not draw this distinction (see paragraph 10 above) and that the Information Commissioner consequently considered a great deal of information which, in our view, fell outside the scope of the request. However, this difficulty did not affect the material conclusions of the Decision Notice.

37. In considering the withheld material relating only to the cases in which there was a decision to prosecute, we have asked ourselves whether (i) the submission (and accompanying information) sent by the CPS to the AGO attracts legal professional privilege; (ii) whether correspondence between the CPS and AGO about the applications attracts legal professional privilege; (iii) whether the AGO lawyer's advice to the AG attracts legal professional privilege; and (iv) whether the signed Fiats consenting to the prosecutions attract legal professional privilege.

38. As to (i) we are satisfied that legal professional privilege attaches to the submission from CPS to AGO. The submission and the information provided in support of it was confidential and was created by the CPS lawyer for the dominant purpose (in fact, the sole intention) of the intended commencement of legal proceedings by his client and to which the AG's consent was a *sine qua non.* We are satisfied that this falls within the category of communications with third parties referred to by Moore-Bick J at the end of paragraph [48] of the *Philip Morris* case referred to above. We do not distinguish the Upper Tribunal's reasoning in *Savic,* but amend it to extend the principles there expressed to communications which fall within that category. In relation to this category of documents, we are satisfied that s. 42 (1) FOIA is engaged.

39. As to (ii) we have considered the withheld correspondence between the CPS and the AGO. We are satisfied that legal professional privilege attaches to this information for the same reason as in relation to category (i) above, as the correspondence is ancillary to the CPS' submission. In relation to this category of documents, we are satisfied that s. 42 (1) FOIA is engaged.

40. As to (iii), the Appellant appeared to concede this point in his submissions referred to at paragraph 20 above. We have considered the withheld information consisting of internal communications within the AGO and the final submission to the AG from his legal adviser. We are satisfied that legal professional privilege attaches to this information, because it was confidential and created with the sole intention of commencing legal proceedings to which the AG's consent is a *sine qua non.* In relation to this category of documents, we are satisfied that s. 42 (1) FOIA is engaged.

41. In considering the public interest balancing test, we bear in mind the Decision of the three-judge panel of the Upper Tribunal in *DCLG,* that weight should be attributed not only to the need to maintain legal professional privilege in any particular case but also to the more generalised risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of the system of legal professional privilege. It seems to us that these considerations preclude us from taking the Appellant's suggested approach of considering whether any particular person would be prejudiced by disclosure, as the public interest in maintaining legal professional privilege engages a wider interest in maintaining the rule of law.

42. It does not seem to us that the Appellant has demonstrated a public interest in disclosure of the requested information which outweighs the public interest in maintaining legal professional privilege in this case. We bear in mind that the prosecutions with which we are concerned were conducted in public and that the public interest in them and public debate about them was enabled by that process. As we have noted, the documents relied on in the prosecution may be disclosable under the principles of open justice. We do not consider that there is a significant public interest in disclosure of the legal advice and other documents which enabled a decision consenting to those prosecutions to be brought, or that these would add significantly to the public debate about the convictions. Neither do we see merit in the argument that the public should be enabled to avoid prosecution by seeing the legal advice which considers the evidence in a particular case and whether a prosecution is likely to lead to a conviction in that case. The legal principles applicable to whether an offence has been or is likely to be committed are properly to be found in the judgments of the court, and not in the documents created in anticipation of a prosecution. Whilst we acknowledge the public interest in transparency and accountability, we do not consider that these outweigh the weighty arguments in favour of maintaining the exemption in this case.

43. As to (iv), we agree with the Information Commissioner that, as it was self-evident that the Fiats were signed because the prosecutions ensued, the signed Fiats no longer held the quality of confidence necessary to attract legal professional privilege. For that reason, we conclude that s. 42 (1) FOIA is not engaged by the three signed Fiats and accordingly that these should now be disclosed. This appeal is therefore allowed in part and our substituted Decision Notice is as above.

44. This is the only respect in which we have found the Decision Notice not to be in accordance with the law. In all other respects, we uphold it.

45. Having considered the terms of the signed Fiats, we consider that redactions in respect of personal data may be necessary. We leave this task to the AGO.

46. In view of our conclusions above, we have not found it necessary to consider the alternative exemptions claimed by the AGO.

(Signed)

ALISON MCKENNA
CHAMBER PRESIDENT **DATE: 14 October 2019**

Promulgation date 30th October 2019