



Tribunals Service
Information Tribunal

IN THE INFORMATION TRIBUNAL

Information Tribunal Appeal Number: EA/2007/0028

Information Commissioners Ref: FS50130128

Freedom of Information Act 2000 (FOIA)

Decision Promulgated 26 September 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

ANDREW BARTLETT QC

and

LAY MEMBERS

MALCOLM CLARKE

SUZANNE COSGRAVE

Between:

**LESLIE KEITH GILLINGHAM
ANN PATRICIA GILLINGHAM**

Appellants

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellants: In person

For the Commissioner: Akhlaq Choudhury

Decision

The Tribunal dismisses the appeal.

Reasons for Decision

Introduction

1. The Gillinghams are the owners of some freehold and leasehold lands at Spratts Down, near Calshot in Hampshire. Their land is crossed by an estate road. They object to the use of the estate road by vehicles driven by neighbours, visitors, and others.
2. The estate road is also a public footpath. Driving a motor vehicle on a footpath without lawful authority is an offence contrary to Road Traffic Act 1988 s34 (1). Accordingly, the Gillinghams have tried to persuade the police to prosecute users of the road for the offence of driving on a footpath.
3. In this they have not been successful. The Crown Prosecution Service (CPS) took advice from counsel and decided, in the light of that advice, not to prosecute. The present appeal concerns the Gillinghams' attempt to obtain disclosure of that advice and related documents.

The request for information

4. The Gillinghams made a request of the CPS on 29 June 2006 under the Freedom of Information Act (FOIA). They requested a copy of

counsel's advice, including copies of documents sent to counsel with the instructions.

5. The CPS responded on 7 July 2006 that whilst the Gillinghams could have copies of documentation provided to counsel, the CPS was unable to disclose either the instructions to counsel or counsel's advice. The response placed reliance on the exemptions under FOIA s40(2) (personal Information where the applicant is not the data subject) and s42 (legal professional privilege). At the Gillinghams' request, the CPS conducted a review of its decision not to disclose the instructions or the advice. By a letter dated 3 August 2006, the CPS confirmed that the requested information would not be disclosed because of the application of the exemption under s.42 of the Act.

The complaint to the Information Commissioner

6. On 16 August 2006 the Commissioner received a complaint from the Gillinghams in respect of the non-disclosure of counsel's advice, the instructions to counsel, and the documents sent to counsel with the instructions.
7. The Commissioner served his Decision Notice on 13 March 2007. He considered whether the matter fell to be considered under FOIA or EIR (the Environmental Information Regulations) and decided on the former. He found that the Gillinghams had been provided with copies of the documents supplied to Counsel. As regards the instructions to counsel and counsel's advice, he found that the qualified exemption in FOIA s42(1) applied, but, for reasons set out at some length, that the public interest in maintaining the exemption outweighed the public interest in disclosure. The full text is available on the Commissioner's website under reference FS50130128.
8. The Commissioner concluded that the CPS had dealt with the information request in accordance with the Act. No steps were required to be taken.

The appeal to the Tribunal

9. The Gillinghams appealed to the Tribunal on six grounds:

(1) The public interest in disclosure is greater because of the number of people affected, given that the decision concerned a public footpath.

(2) The public has a right to know the reason for the CPS's decision not to prosecute. No explanation has been provided to date.

(3) Contrary to the Commissioner's belief, there are no ongoing proceedings, and the civil courts have not determined the ownership of the subsoil below the footpath.

(4) Their neighbour misrepresented the position to the Courts and granted to tenants rights of way for motor vehicles over the footpath, when he had no legal title to the subsoil. An unlawful grant cannot constitute a defence to a prosecution.

(5) They have not been provided with copies of all of the material sent to Counsel.

(6) The Commissioner failed to take into account the case of Bakewell Management Ltd v Brandwood (2004) or a letter dated 5 April 2005 from the Gillinghams' solicitor to the CPS.

10. Both parties submitted that the appeal should be determined on the papers without an oral hearing. The Tribunal agreed, and so ordered.

The questions for the Tribunal

11. There has been no challenge to the Commissioner's decision that the matter falls to be considered under FOIA, rather than EIR. The information requested is not information on environmental matters as defined in EIR regulation 2(1) but is information concerning a decision not to prosecute.

12. The Commissioner was informed by the CPS, and accepted, that all the material sent to counsel, other than counsel's formal instructions, was provided to the Gillinghams. The Gillinghams have not pointed to any evidence which suggests any such material has been withheld. Accordingly, the fifth ground of appeal is not substantiated and need not be further considered.
13. The Gillinghams have not disputed that the section 42 exemption is applicable to counsel's advice, and the formal instructions pursuant to which the advice was given. This is plainly correct. Instructions to counsel, and counsel's advice, are classic examples of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. There is no suggestion that privilege has been waived.
14. Accordingly, the sole question for the Tribunal is whether the Commissioner was right to conclude, in the particular circumstances of the case, that the public interest in maintaining the exemption for counsel's advice and formal instructions outweighed the public interest in disclosure: see FOIA s2(2)(b).

Evidence

15. We were provided with a bundle of relevant letters and associated documents. We also read the decision of the Court of Appeal in Hampshire County Council v Gillingham [2000] EWCA Civ 105, which was referred to in the documents provided.

Analysis

16. The strength of the public interest in maintaining legal professional privilege was discussed in the Tribunal's decisions in Bellamy (3 April 2006) at paragraphs 8-11, Kitchener (20 December 2006) at paragraphs 16-17, and Shipton (11 January 2007) at paragraph 13(d). We refer to, and refrain from repeating, what was said in those cases. It is sufficient for present purposes for us to note that, generally

speaking, the public interest reasons for maintaining the legal professional privilege exemption are particularly strong. This is because the purpose of the privilege is to serve the administration of justice and to safeguard the right of any person to obtain entirely frank and realistic legal advice. The privilege is a fundamental human right long established in the common law and now supported both by European law and by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Nevertheless the balance of public interest must be assessed in each case to see whether in the particular circumstances the public interest in maintaining the exemption outweighs the public interest in disclosure.

17. For the purposes of the present case it should also be noted that the policy reasons which undergird legal professional privilege apply as strongly to the request for advice as to the advice itself.

18. A person seeking disclosure of material protected by legal professional privilege could argue that Parliament, by making the exemption in the Act qualified and not absolute, intended that legal professional privilege could be overridden without any particular difficulty. We do not consider that this is what Parliament intended. The test which we must apply is that laid down in s2(2)(b), namely, that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This wording does not give any guidance as to the degree of importance of the public interest in maintaining a particular exemption. On the inherent importance of the exemption we take our cue from the decisions mentioned in paragraph 16 above.

19. The first ground of appeal is that the public interest in disclosure is greater because of the number of people affected, given that the decision concerned a public footpath. We agree that the decision concerned a public footpath and that this is a relevant factor which must be weighed in considering the balance of public interest. This must be done not singly but in conjunction with the other relevant

factors. This factor is not a particularly strong one in the present circumstances, since the number of people affected is small.

20. We take together the second, third and fourth grounds, namely (2) the public has a right to know the reason for the CPS's decision not to prosecute, and that no explanation has been provided to date, (3) contrary to the Commissioner's belief evident in the terms of the Decision Notice, there are no ongoing proceedings, and the civil courts have not determined the ownership of the subsoil below the footpath, and (4) the Gillinghams' neighbour misrepresented the position to the Courts and granted to tenants rights of way for motor vehicles over the footpath, when he had no legal title to the subsoil: an unlawful grant cannot constitute a defence to a prosecution.

21. To say that no explanation has been provided for the decision not to prosecute is not quite correct. The matter was originally considered, without the involvement of counsel, as far back as 2001. In a letter of 25 October 2001, the Hampshire Constabulary passed on the opinion of a senior crown prosecutor, namely, that the Manor of Cadland had granted rights of way with motor vehicles over the public footpath and that visitors and tradespersons calling on the grantees would have a lawful excuse if using the footpath for the purpose of access. The Gillinghams disagreed with this reasoning and wrote a lengthy rebuttal, which generated further correspondence. The Gillinghams' view was that no valid rights of way for motor vehicles had been granted. Ultimately, after the obtaining of counsel's advice, the CPS wrote on 17 May 2006, stating that counsel's conclusion was that there would not be a realistic prospect of conviction.

22. Thus the complaint is not that no information has been given concerning the reasons for declining to prosecute but that the information is insufficiently detailed. The Gillinghams would like to know more, and contend that the public is entitled to know more.

23. It is clear from the circumstances and the evidence before us that any such drivers, if prosecuted, would claim, rightly or wrongly, to have had lawful authority, pursuant to rights granted or purportedly granted by Mr Drummond, as the tenant for life of the Manor of Cadland, or some other similar rights.
24. We note of course that the Gillinghams dispute the validity of any such rights and contend that Mr Drummond was not the owner of the subsoil at the material time. If the Gillinghams are correct about that, it would follow that the defence of lawful authority would not be available. But it is not within the remit of this Tribunal to decide whether the Gillinghams are right or wrong about that. The Tribunal's task is to see that the law on freedom of information is correctly applied, not to decide disputed questions of property law.
25. We have not seen counsel's opinion and do not know precisely what counsel wrote in it. It would not be surprising if counsel advised that a criminal court, faced with a charge dependent upon disputed issues of property law resting on unclear facts, would have difficulty in reaching a conclusion, beyond reasonable doubt, that the drivers lacked lawful authority. Nevertheless, this is only speculation, and the Gillinghams are correct in so far as they assert that detailed reasons have not been made public.
26. Having studied the decision of the Court of Appeal in Hampshire County Council v Gillingham [2000] EWCA Civ 105, we are prepared to assume in the Gillinghams' favour that there are no ongoing proceedings.
27. The Commissioner did not actually say in his Decision Notice that there were ongoing proceedings. His reference (at paragraph 19) to a 'live issue' is explained in later paragraphs, where he said that there was a 'real possibility' or a 'reasonable prospect' of further legal proceedings (paragraphs 42 and 53). The Court of Appeal referred to the 'incessant warfare' over the road since 1985. In our view the Commissioner was

justified in inferring that there might be further proceedings. Even if there were no prospect of further proceedings, that would be only one factor to be weighed in making the judgment whether disclosure should be made.

28. We are further prepared to assume, in the light of our reading of the decision of the Court of Appeal, that (contrary to the view of the Commissioner) the civil courts have not determined the ownership of the subsoil below the road and footpath (although we note the absence of any suggestion in that case that the Gillinghams themselves are the owners of it).
29. This feature seems to us to be an obstacle to any prosecution. As we have already indicated, if the ownership is uncertain, it is difficult to see how a prosecution could end in a conviction. More relevantly for present purposes, the fact that the ownership has not been determined does not appear to us to be a reason for disclosure. If anything, it suggests an increased probability of further litigation, and hence an increased desirability that counsel's opinion should remain private to the party which commissioned it.
30. The Gillingham's assertion, that the public has a right to know the reason for the CPS's decision not to prosecute, is in our view an overstatement. Whether the public has the right to know the detailed reasons depends upon the balance of public interest in the particular circumstances.
31. The sixth and final ground of appeal is that the Commissioner failed to take into account the case of Bakewell Management Ltd v Brandwood (2004) or a letter dated 5 April 2005 from the Gillinghams' solicitor to the CPS.
32. Bakewell Management Ltd v Brandwood [2004] UKHL 14 was concerned with whether it was possible to acquire an easement over land as a result of long and uninterrupted user in circumstances where (unless the owner had granted authority) the user was in breach of a

statutory prohibition. In this context the House of Lords discussed (among other things) section 34 of the Road Traffic Act 1988. At paragraph 8 Lord Hope stated that section 34 recognises that it is open to the owner of the land to grant the authority that is needed for the use of it not to constitute an offence. This statement follows directly from the wording of the section.

33. The letter dated 5 April 2005 from the Gillinghams' solicitor to the CPS presents arguments to the effect that Mr Drummond lacked the power to grant rights of way for vehicles over the road.

34. As we have indicated, it is not for us to decide whether in the present case the true owner of the subsoil of the road has given lawful authority so that use of it does not constitute an offence. In our view the decision in Bakewell and the assertions by the Gillinghams' solicitor do not affect the issue concerning the balance of public interest under FOIA.

Conclusion

35. The Commissioner submitted:

“... even if it had been the case that Mr & Mrs Gillingham had been left completely in the dark as to the reasons for not prosecuting, the public interest in their having such knowledge would still not outweigh the very great interest in maintaining privilege.”

36. The Commissioner considered the particular circumstances of the case and weighed at some length the competing considerations (Decision Notice paragraphs 30-52). While we do not take the same view as the Commissioner on every point of detail the extent of our disagreement does not affect the outcome. For the reasons referred to in paragraph 16 above, the public interest in maintaining legal professional privilege generally outweighs the public interest in disclosure. For it not to do so,

the public interest in disclosure needs to be particularly strong, because proportionate reasons are required for not upholding a fundamental human right. In order to make the broad judgment that is required, it is not necessary for us to enter into the question whether and to what extent Article 8 of the Convention applies to corporate bodies, contrasted with individuals. We can see nothing in the circumstances of the present case which constitutes particularly strong reasons for disclosure. We agree with the Commissioner's conclusion that the public interest considerations in maintaining the exemption are stronger than those which support disclosure. In our judgment they are much stronger.

37. The appeal must therefore be dismissed.

38. Our decision is unanimous.

Signed

Andrew Bartlett

Deputy Chairman

Date 26 September 2007