Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0011
Information Commissioner's Ref: FS50082127

Heard at the Employment Appeal Tribunal
On 15 and 16 September 2008

Decision Promulgated
7 October 2008

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

ROSALIND TATAM AND DAVID WILKINSON

Between

DERMOD O'BRIEN

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM (formerly DEPARTMENT OF TRADE AND INDUSTRY)

Additional Party

Representation:

For the Appellant: in person
For the Respondent: Anya Proops
For the Additional Party: Helen Mountfield

Subjects areas covered:

Public interest test s.2

Formulation or development of government policy s.35(1)(a)

Ministerial Communications s.35(1)(b)

Legal professional privilege s.42

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 8 January 2008.

SUBSTITUTED DECISION NOTICE

Dated 7 October 2008

Public authority: Department for Business, Enterprise and Regulatory Reform

Address of Public authority: 1 Victoria St, London SW1 0ET

Name of Complainant: Dermod O'Brien

The Substituted Decision

For the reasons set out below, it is decided that the public authority was obliged under section 1(1) of the Freedom of Information Act 2000 to communicate the "disputed information" to the complainant, but has failed to do so; furthermore, there may be other information of the description specified in the request held by the public authority which it is also obliged to communicate to him.

Action Required

The public authority must take the following steps:

(1) communicate the "disputed information" to the complainant by 4.00 pm on 7 November 2008 (but with the redactions mentioned in para 40 of the reasons below);

(2) use its best endeavours over the next four weeks to find and retrieve any other information held by it of the description specified in the request;

(3) by 4.00 pm on 7 November 2008 either communicate any information so found to the complainant or, in so far as it seeks to rely on any exemption, communicate it to the Information Commissioner with a notice complying with section 17(1) and (3) of the 2000 Act in order for the Commissioner to decide whether any such exemption is properly relied on.

Dated this 7 day of October 2008

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. On 8 June 2000 the Secretary of State for Trade and Industry made the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The Regulations were made in order to give effect to EU Council Directive 97/81/EC "concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC[1]". They give to any "part-time worker" (as defined) the right not to be treated less favourably than a "comparable full-time worker" unless the less favourable treatment can be objectively justified. Regulation 17 provides:

> **These Regulations do not apply to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis**.

2. Mr O'Brien is a recorder and thus a part-time judge who is remunerated on a daily fee-paid basis. On 13 April 2005 he requested the DTI under the Freedom of Information Act 2000 to disclose to him all documents held by it relating to the inclusion of regulation 17 in the Regulations as enacted, including internal and inter-departmental communications relating to "the form of, the reasons and justification for, and/or the validity of Regulation 17". The DTI accepted that such documents were held but resisted their disclosure on the basis of the qualified exemptions provided by sections 35 ("formulation of government policy, etc") and 42 ("legal professional privilege").

3. Mr O'Brien complained to the Information Commissioner under section 50 and the Commissioner (save in one minor respect) upheld the DTI's position in a decision notice dated 8 January 2008. He has appealed to the Tribunal against that decision. The essential issue on the appeal is whether the Commissioner was right

[1] Union of Industrial and Employers' Confederations of Europe, European Trade Union Confederation and European Centre of Enterprises with Public Participation.

to find in this case that the public interest in maintaining the exemptions in sections 35 and 42 outweighed the public interest in disclosing the information requested.

The factual background

4. Directive 97/81/EC was made by the Council on 15 December 1997. It required Member States to implement the Framework Agreement (which itself prohibits part-time workers being treated less favourably than comparable full-time workers in respect of employment conditions unless such treatment is justified on objective grounds) by bringing into force all necessary laws, regulations and administrative provisions. Clause 2 of the Framework Agreement provides:

> **1. This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.**
>
> **2. Member States, after consultation with social partners…may, for objective reasons, excude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis…**

Directive 97/81/EC was extended to the UK by a further Directive made on 7 April 1998 (98/23/EC) which required it to implement the Framework Agreement by 7 April 2000.

5. We note at the outset that there is a dispute between Mr O'Brien and the DTI as to whether the inclusion of regulation 17 in the UK Regulations was permissible under the Directive but that it is no part of our function to rule (or even express any view) on this issue save to say that it was (and indeed remains, notwithstanding the decision of the Employment Appeal Tribunal in *Christie v DCA* [2007] ICR 1553) a moot legal point. Also the fact that Mr O'Brien personally has since 2005 brought a claim against the DTI alleging that he as a recorder is treated less favourably than full-time judges in relation to pension and payments for training days is not relevant to the matters we must decide.

6. The DTI had departmental responsibility for the implementation of European Directives on employment. The mechanism by which the Framework Agreement was implemented was that a provision was included in the Employment Relations Bill, which subsequently became section 19 of the Employment Relations Act 1999, empowering the Secretary of State to make regulations for securing that those in

part-time employment were not treated less favourably than those in full-timer employment. While the Bill was being considered by the relevant standing committee in March 1999 the DTI Minister stated that draft regulations would be produced and that the government would consult publicly and take full account of all comments.

7. It appears from a letter dated 23 March 1999 from the Lord Chancellor's Department ("LCD") to the DTI (document B2 which was disclosed to Mr O'Brien on the direction of the Information Commissioner) that while the Bill was still going through Parliament the LCD was already concerned that any regulations made should not apply to part-time judicial office-holders and asked to be consulted about the point before any regulations were drafted. The letter also mentioned that the LCD was then involved in arguments with one group of judicial office-holders who claimed that the Working Time Regulations applied to them.

8. On 17 January 2000 the Secretary of State, then Stephen Byers, published a public consultation document and draft regulations. The draft regulations were entitled "The Part-Time Employees (Prevention of Less Favourable Treatment) Regulations" and gave rights and remedies to part-time "employees" in the strict legal sense. There were specific provisions in the draft regulations relating to the armed forces, staff at the House of Lords and Commons and the police but no mention of judicial office-holders. Responses were to be sent to the DTI by 27 February 2000.

9. There were two relevant developments before the regulations in their final form were produced. On 22 March 2000 the standing committee reported on the draft regulations and recommended that their coverage should be broader than just employees: this recommendation was accepted by the government. And on 12 April 2000 the Northern Ireland Court of Appeal decided, in a case called *Perceval-Price*, that full-time industrial tribunal members fell within the definition of "worker" in Article 141 of the EU Treaty which prohibits sex discrimination in the employment field.

10. Matthew Hilton, the Director of Employment Relations at the Department who gave evidence on its behalf, told us that the final draft of the Regulations was laid before

Parliament on 3 May 2000. In due course it was approved by resolution of each House and the Regulations were made on 8 June 2000. In their final form they gave rights and remedies to "workers" who were defined to include both employees and other individuals working under contracts whereby they undertook to carry out personal work for another. They also included regulation 17. It was accepted that there was no consultation on that provision, no publicity about its inclusion and no discussion of it in Parliament before it became law.

11. As revealed by some documents which were disclosed to Mr O'Brien voluntarily at the review stage (referred to as B10) a part-time employment tribunal chairman wrote to the LCD about regulation 17 on 1 September 2000. He stated that regulation 17 had not been part of the original draft and that it had taken him by surprise but that, had it appeared in the original draft, he would have wanted to make representations about it. He stated that he was at a loss to understand the basis on which it was thought right to include it as a matter of principle. The letter concluded in these terms:

> **I am conscious of my right to seek to enforce…the 1997 Directive against the government by direct action in the appropriate forum here in the UK but the purpose of this letter is to put my case as a matter of law and in principle at this early stage for pension rights pro rata with those enjoyed by full time Chairmen of Employment Tribunals and to invite the Lord Chancellor's reasoned observations...**

The letter was copied to his MP and in due course referred to the DTI. B10 contains a draft response from the DTI to the MP which states:

> **As you will appreciate, those whom we customarily call part-time judicial office holders have not generally been considered as "part timers" in the conventional sense of the term, nor have they been treated in the past as workers for the purposes of domestic law. The Government has therefore taken the view that certain benefits of the kind that are provided to part-time employees are not appropriate to the particular circumstances of part-time judicial office-holders, the great majority of whom are practitioners otherwise engaged in legal practice. On the basis of previous precedent, there would have been no expectation that the Part Time Workers regulations would have had application to part-time judicial office holders, and I know that the Lord Chancellor's Department share the view that part time judicial office holders are not workers for the purposes of the Part Time Work Directive. However, because of the uncertainty that has arisen in respect of other regulations, and related issues that were under consideration by the Courts, it was felt appropriate in implementing the Directive to include a specific exemption for the avoidance of doubt.**

We assume that a letter was sent in those terms.

The request for information and complaint to Commissioner

12. Mr O'Brien's request for information was sent to the DTI on 13 April 2005. DTI officials searched the files and located 10 documents within the scope of the request which are documents B1-10. They responded to him on 17 May 2005 stating that they would not be disclosing the information requested in reliance on exemptions in sections 35(1)(a) and (b) and 42. The letter of 17 May 2005 (which was signed by a Senior Policy Advisor) went on to "…set out some of the background to Regulation 17" in terms very similar to those in the draft letter produced 4 ½ years earlier which we have set out above. Mr O'Brien pointed out to us some subtle differences in the wording of the two letters and we note that in the letter to him the term "fee-paid judicial office-holder" had been substituted for the term "part-time judicial office-holder". Mr O'Brien sought and obtained an internal review of the DTI's decision on 21 June 2005; save for the release of B10, the original decision was upheld.

13. Mr O'Brien complained to the Information Commissioner on 27 June 2005 but unfortunately the Commissioner's decision was not forthcoming until 8 January 2008. The Commissioner saw the disputed information in documents B1-9. Save in relation to document B2 he decided that the DTI had acted in accordance with Part I of the 2000 Act in withholding documents B1-9.

14. So far as the details of the Commissioner's decision are concerned, he found that document **B2** was covered by the exemption at section 35(1)(a) (information relating to the formulation or development of government policy) but that, "as the policy is now enshrined in published Regulations", the public interest in withholding it had diminished and there was no reason for it to remain exempt and he ordered its disclosure. He found that documents **B1** and **B5** were covered by the exemption at section 35(1)(b) (information relating to Ministerial communications) and that they charted the frank discussion between government departments and that if disclosed they could highlight divisions within Government which could undermine the principle of Cabinet responsibility; notwithstanding the age of the documents he found that, while the Ministers had changed "the underlying issue remains live", and that the public interest balance was therefore in favour of maintaining the exemption. In relation to document **B9** the department changed its position in the

course of the investigation to one of reliance on section 36(2)(a)(i) and (b)(i). The Commissioner agreed that section 35 did not apply to the document and, despite some misgivings about the procedure followed in order to obtain the "reasonable opinion" of the minister as required by section 36, decided that the exemption was engaged; he went on to decide that the public interest required the exemption to be upheld but on the basis of a particular factor which tipped the balance, namely that "…litigation directly relating to the issue at hand is in train between [Mr O'Brien] and another public authority [presumably a reference to the Ministry of Justice]" which had been in prospect at the time of the request. The Commissioner found that documents **B3**, **B4**, **B6**, **B7** and **B8** contained exempt information coming within section 42 (legal professional privilege) in that it consisted of advice provided by in-house lawyers in relation to the DTI's rights and duties; in relation to the public interest test he referred to the Tribunal decision in the *Bellamy* case (EA/2005/0023, 4.4.06) and decided that the "very powerful public interest arguments" required to allow such advice to be released were not present in this case.

15. Our job on this appeal is to consider whether the Commissioner's decision is in accordance with the law and, in so doing, we can carry out a full review of the facts. The most important factual circumstance in any case is likely to be the content of the disputed information itself, the matter to which we now turn.

<u>The "disputed information"</u>

16. Like the Commissioner, the Tribunal has been provided with the documents identified by the DTI as containing the requested information and part of the hearing of the appeal was therefore of necessity held in closed session. In the course of preparing for the appeal officials also came across two further documents which they considered to come within the scope of the request (B11 and 12) and they have been dealt with by the Tribunal in the same way as the others, the DTI relying on sections 35(1)(a) and 42 respectively in order to resist disclosing them.

17. The content of the disputed information is described in more detail under the heading "Rider A" in the Annex to this decision. The Annex shall remain confidential to the department and the Commissioner pending any possibility of

successful appeal against this decision; subject to that Rider A can conveniently be read into our reasons at this stage.

Is the disputed information "exempt"?

18. The relevant provisions of the Act are as follows:

> **35(1) Information held by a government department…is exempt information if it relates to**
>
> **(a) the formulation or development of government policy**
>
> **(b) Ministerial communications…**
>
> **36(1) This section applies to (a) information which is held by a government department …which is not exempt information by virtue of section 35…**
>
> **(2) Information to which this section applies is exempt information if, in the reasonable opinion of a [Minister of the Crown], disclosure of information under this Act**
>
> **(a) would, or would be likely to, prejudice…the maintenance of the convention of the collective responsibility of Ministers of the Crown…**
>
> **(b) would, or would be likely to, inhibit…the free and frank provision of advice…**
>
> **42(1) Information in respect of which a claim to legal professional privilege…could be maintained in legal proceedings is exempt information.**

19. As we have already described the Commissioner considered the disputed information document by document and decided, in effect, that the information in document B2 was exempt under section 35(1)(a), the information in documents B1 and B5 was exempt under section 35(1)(b), the information in document B9 was exempt under section 36 and the information in documents B3, B4, B6, B7 and B8 was exempt under section 42. We do not think it is possible to categorize the information document by document in the way the Commissioner has done but we are quite satisfied that (apart from some paragraphs in documents which do not come within Mr O'Brien's request at all which we note in para 40 below) the information in all those documents and in documents B11 and B12 was exempt by virtue of sections 35(1)(a) and/or (b) and/or 42; indeed, the very terms of Mr O'Brien's request are such that any information coming within it is almost bound to be covered by one or more of those exemptions.

20. In making that finding we would make the following observations about the application of sections 35 and 42 in this case:

    (1) Section 35(1)(a) refers to "the formulation or development of government policy": it seems to us that the "policy" to which the information in this case can be said to "relate" could be defined more or less widely but that it would certainly cover the policy of including regulation 17 in the Regulations as made; that particular policy was definitively formed by the time the regulations were made in June 2000.

    (2) Sections 35(1)(a) and (b) exempt information which "relates to" the formulation of policy and Ministerial communications. It is clear in our view that the information does not have to come into existence before the policy is formed for section 35(1)(a) to apply and that section 35(1)(b) is not confined to the Ministerial communications themselves.

    (3) In relation to section 42 we gratefully adopt the reasoning of the Tribunal in the *Calland v Information Commissioner* (EA/2007/0136, 8.8.08) to the effect that legal professional privilege covers advice given by "in-house" (in this case government) lawyers; we have also assumed in the department's favour (though no submissions were made on the point) that if legal advice is repeated by officials in one department to those in another it still remains privileged.

21. In relation to the information in document B9 we have formed the view, as did the DTI originally, that it is covered by section 35(1)(a). It necessarily follows that it cannot be covered by section 36. This conclusion makes it unnecessary for us to consider the interesting (and in our view arguable) points raised by Mr O'Brien on section 36, namely (a) that on a proper construction of section 36 it could not apply because the minister's opinion relied on had not been formed at the relevant time (ie when the DTI decided to withhold the information) and (b) that the evidence was in any event inadequate to support a finding that the opinion was actually formed or that it was reasonable.

22. Each of the exemptions which we have found to apply in this case are "qualified" exemptions so that the disclosure obligation in section 1(1)(b) is only disapplied:

if or to the extent that…in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b))

We must therefore turn to consider where the public interest lies in this case.

Proper approach to public interest test

23. We were referred to a large number of cases on the proper approach to the public interest test in relation to the section 35 and 42 exemptions, mainly decisions of this Tribunal. The only relevant binding authorities are two recent High Court decisions, namely *ECGD v Friends of the Earth* [2008] EWHC 638 (Admin) (in particular paras 25 to 38) and *OGC v Information Commissioner* [2008] EWHC 774 (Admin) (in particular paras 68 to 80); those decisions refer to and approve passages from the decisions of this Tribunal in *DfES* (EA/2006/0006, 19.2.07) and *Secretary of State for Work and Pensions* (EA/2006/0040, 5.3.07). We propose to follow the approach set out in those cases and the general guidance in the early Tribunal decision in *Hogan* (EA/2005/0026, 17.10.06).

24. None of those cases deal directly with the application of the public interest test in a legal professional privilege case. In relation to this we were referred to a series of Tribunal cases, namely *Bellamy* (EA/2005/0023, 4.4.06), *Mersey Tunnel* (EA/2007/0052, 15.2.08) (which itself quotes extensively from the decision in *Pugh* (EA/2007/0055)) and *Fuller* (EA/2008/0005, 5.8.08). If and in so far as there is any conflict in the approach adopted by the Tribunal in those cases we prefer the approach adopted in the *Mersey Tunnel* case. We make only two observations:

    (1) Even in a section 42 case all the circumstances of the case must be considered and the public authority's disclosure obligation will only be disapplied if the public interest in maintaining legal professional privilege outweighs the public interest in disclosure in that particular case;

    (2) Legal professional privilege clearly includes not only "litigation privilege" but also "legal advice privilege"; the existence or threat of litigation is therefore not necessary for section 42 to apply but may well be a highly relevant factor in assessing where the public interest balance lies.

25. We were invited (in effect) to resolve a continuing debate of principle between the Commissioner and government departments relating to the relative strengths of the public interests underlying the exemptions in sections 35 and 42. We do not think that it is necessary or helpful to take up that invitation and to add to the length of this decision and the Tribunal's already quite extensive jurisprudence on these issues. Rather we prefer to approach matters simply by (a) reminding ourselves of the rationale underlying the relevant exemptions and the nature of the respective public interests to be weighed (b) identifying the relevant circumstances of this case and (c) asking ourselves the statutory question raised by section 2(2)(b) as at the relevant date, which is the date of the DTI's review decision, June 2005.

Nature of public interests

26. As to the public interest in disclosure of information under the Act, the High Court has approved the following statement of the Tribunal from *Secretary of State for Work and Pensions* (EA/2006/0040, 5.3.07):

> **[T]here is an assumption built into FOIA that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities… (see para 71 of *OGC v Information Commissioner* [2008] EWHC 774 (Admin)).**

Transparency and accountability can in turn give rise to more informed public debate and better decision making by government.

27. The exemptions in section 35 are "class" exemptions. The public interest underlying them is, in the widest sense, also good government. As to section 35(1)(a), there is a public interest in maintaining the confidentiality of discussions and advice within and between government departments on matters leading to a policy decision: this is to allow ministers and officials to have a full and frank exchange and to have the time and space to explore options and "hammer out" policy safe from the threat of "lurid headlines" (see paras 38 and 40 of *ECGD* decision, paras 100-101 of *OGC* decision and para 17 of *Secretary of State for Children, Schools and Families* [2008] EWHC 1199 (Admin)) so that they can reach good policy decisions. As to section 35(1)(b) there is also a specific public interest in maintaining the confidentiality of ministerial communications arising from the convention of collective responsibility of Ministers of the Crown, which is that once a

policy decision has been reached by the Government it has to be supported by all ministers whether they approve of it or not unless they resign: that convention and the free discussion between Ministers may be prejudiced by "premature disclosure" of the views of individual Ministers (see *Attorney-General v Jonathan Cape* [1976] 1 QB 752 at 764E, 771B-D, to which we were referred by Ms Proops). The convention obviously applies with extra force in relation to Ministers who are members of the Cabinet.

28. Section 42 also provides for a class exemption in respect of information subject to legal professional privilege which includes, as we have said, legal advice privilege as well as litigation privilege. The public interest underlying legal professional privilege was described by Lord Hoffman in *R v Special Commissioner of Income Tax* [2003] 1 AC 563 in a passage quoted by the Tribunal in *Bellamy* at para 11 as follows:

> **[Legal professional privilege] is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before his adviser without fear that they may afterwards be disclosed and used to his prejudice.**

The same considerations obviously apply to the content of the advice itself.

Relevant circumstances

29. As well as the content of the disputed information itself and the factual background we have recited, the following particular circumstances should be recorded as being of relevance:

(1) The numbers of people potentially affected by regulation 17: no-one was able to assist on how many part-time daily fee-paid judicial officers there were but it seems that there must be several thousand. The view was expressed within Government that if the Regulations did apply to them it could have serious financial implications but we were not provided with any further detail of this.

(2) It is implicit in the history we have set out above but worth expressly noting that five years had passed between the making of the Regulations and the decision to decline Mr O'Brien's request for information.

(3) The "litigation context" was a point relied on particularly by the Commissioner: the Tribunal pressed counsel for the Department and the Commissioner for specifics of exactly what litigation was relevant as at June 2005, but the only evidence about the litigation position was (a) the evidence about the claim which had been raised in correspondence by the part-time employment tribunal chairman (see para 11 above) (b) the then inchoate claim in the mind of Mr O'Brien (c) the *Perceval-Price* litigation (concerning Art 141 of the EU Treaty: see para 9 above) and (d) various references to claims by part-time tribunal members under the Working Time Directive or Regulations.

(4) On-going related policy debates: again the evidence was rather vague, but Mr Hilton reminded us that there is a constant flow of employment protection legislation coming from Europe and a constant debate within the Department about how to treat those engaged in what he called "atypical working".

(5) We were reminded that the relevant Cabinet Ministers, Mr Byers, the Secretary of State for Trade and Industry, and Lord Irvine, the Lord Chancellor, left government in May 2002 and June 2003 respectively.

(6) We record at Rider B in the Annex some evidence given in closed session.

30. Before turning to address the statutory question we must also record the evidence given by Mr Hilton in support of the Department's position that the public interest balance was against disclosure.

Mr Hilton's evidence

31. Mr Hilton is a senior and experienced civil servant, having worked at the Department since 1992 and been principal private secretary to two Secretaries of State, and he was, as one would expect, a frank and helpful witness. However, his written statement was very general, he personally did not participate in any of

the events we are concerned with, and it did not seem to us that he was particularly familiar with the detail of the case (for example he was unable to answer a question from Mr O'Brien as to which department pays judge's pensions).

32. Mr Hilton's statement emphasises the importance for good government of there being full, free and frank debate within government when policy is being considered, both between different ministers and their respective departments and between ministers and their own officials, and the importance of what he calls "protected thinking space" during that process. It also emphasises the importance for good government of legal advisors being given the full factual picture and feeling free to give fully informed, clear and unambiguous advice, including expressing concerns and identifying weaknesses. The statement makes the point that those giving advice or expressing opinions must be allowed to express the pros and cons of policy options and the strengths and weaknesses of legal positions openly and that such advice and opinions must be fully and properly recorded. None of those points can in our view be regarded as contentious: they are well established and recognised in law.

33. Mr Hilton's statement goes further. He notes that the disclosure of information which exposes differences of opinion between Ministers and Departments and officials or problems and weaknesses in a certain position can be exploited by the media as showing division within Government or exploited by those bringing legal challenges in support of their case; and in this case he told us those dangers apply in particular because there is still "litigation sensitivity" and on-going debate within government as to the proper extent of the concept of a "worker" in European and domestic employment rights legislation (though his evidence on this point was, as we have said, somewhat vague). Although expressed in different ways throughout the statement, the general theme expressed is that it is the Department's belief that if the disputed information is disclosed in this case and others like it Ministers and officials will as a consequence be inhibited in future from having a full, free and frank debate and/or from recording that debate properly. The statement acknowledges in the context of discussing documents B1 and B5 that the public interest in withholding such documents may diminish over time but states that the

department believes that "…we are some way form that being the case in relation to these documents." In relation to information subject to legal professional privilege he expresses the department's view that officials and legal advisors must be able to seek and to give legal advice "…in the *certainty* that the request – and the advice – are *never* made public" (our emphasis) and that "anything less would undermine the client's confidence in the integrity of the advice, and could inhibit the freedom with which the client seeks such advice".

34. Mr Hilton was questioned about this evidence at some length by Ms Proops for the Commissioner and by members of the Tribunal and his oral evidence did not entirely support the rigid positions set out in the statement. Mr Hilton accepted that he could not identify any actual instance of a disclosure made under the Freedom of Information Act having affected the quality of any advice given by civil servants or the way they performed their duties in general. He confirmed that it is his "hope and experience" that civil servants will continue, notwithstanding the Act, to act in accordance with their professional obligations, which would include providing ministers with frank and properly recorded advice, and that they will not allow the Act to affect their behaviour in this respect. He nevertheless continued to express concerns that civil servants may be less "brave" and rigorous in their advice and/or may not keep a full enough record of positions if information like that in this case is disclosed, but he also accepted that such concerns could be addressed by appropriate training. He accepted that since the freedom of information regime was obligatory disclosures made under it would not damage the necessary trust between ministers and civil servants and that there was no reason to be concerned that ministers would be led to disengage from their officials as a consequence of it. He accepted that his concerns about the risk to the quality of government decision-making resulting from cumulative disclosures under the Act were speculative.

35. Mr Hilton also accepted that information about the formulation and development of government policy becomes less sensitive as time goes by but, he said and we accept, its sensitivity does not go away the moment a policy is adopted or a ministerial statement made and, we note, in some cases the implementation of a policy is part of its development. In relation to the maintenance of the convention of collective ministerial responsibility he also accepted that the need for confidentiality

would inevitably depend on all the facts including whether relevant ministers had left the Government, whether there had been a change of administration or in policy or the wider political context, the gravity of the issues on which any divisions had arisen and the time that had passed before the information in question was requested.

36. Mr Hilton was not questioned about the views he expressed in relation to legal professional privilege, but we cannot accept his position that (in effect) information subject to the privilege must remain inviolate notwithstanding the Freedom of Information Act. As we have already recorded at para 24(1) above, the Act requires that the balance of the public interest is considered even in a case where section 42 is relied on.

The statutory question

37. We turn then to ask ourselves the statutory question based on section 2(2)(b), the terms of which we have already set out in para 22 above. Notwithstanding Mr Hilton's evidence and the submissions made on behalf of the Commissioner and the Department, we have reached the firm conclusion that ***in all the circumstances of this case*** as at June 2005 the public interest in disclosing the information substantially outweighed the public interest in maintaining the exemptions we are concerned with, so that the obligation to disclose was not disapplied under section 2(2)(b). We reach that conclusion in relation to all the disputed information and in relation to each of the exemptions separately.

38. The main considerations which have led us to this conclusion are these:

(1) We accept Mr O'Brien's contention that, on the face of it, regulation 17 and the way it was introduced without prior consultation or publicity could have given rise to legitimate public concerns, in particular because:

(a) the regulation appeared to single out one particular group for special treatment;

(b) this would add to the possible sense of unfairness on the part of that group that they did not have an opportunity to say anything about it

before it became law; we reject Mr Hilton's response to Mr O'Brien's cross-examination on this point to the effect that because the regulation was simply a technical "avoidance of doubt provision" there was no need for any kind of consultation: the very fact that there was "doubt" to be dispelled and that the regulation was thought necessary indicates that those within its terms might have had proper representations to make;

(c) the inference could be drawn either that it was drafted at the last moment in haste or that it was "slipped in" in order to avoid the attention of the group affected by the measure, which is a group (including many lawyers) who may be particularly vociferous.

(2) The Tribunal has of course seen the disputed information which throws some light on these concerns: we refer to Rider C in the Annex to this decision where we comment further on what the disputed information shows which is relevant to our conclusion.

(3) Although it is no part of our function to reach any view about the ultimate validity or strength of the concerns we refer to in (1) and (2) above, we are of the view that the fact that there could be such legitimate concerns would have tended to strengthen the general public interest in disclosure of the disputed information, because disclosure would have helped to confirm or dispel such concerns and to provide lessons for the future, as well as helping those affected by the decision to make representations about it even after the event.

(4) Ms Proops for the Commissioner relied on the fact that Mr O'Brien had been already been provided with an explanation for the inclusion of regulation in open correspondence (as we record in para 12 above) as a consideration against the public interest in disclosure; that, it seems to us, is a weak consideration: the explanation given can we think fairly be described as "bland" and does not (and is not intended to) provide as full a story as is provided by the disputed information.

(5) The policy decision to include regulation 17 in the Regulations had been finally implemented five years before June 2005 and in the meantime there had been an election and the two Cabinet Ministers concerned had left the Government; further, the policy decision to include regulation 17 was essentially a tactical one, potentially of some financial significance but not, we think, of great importance in the context of central government policy overall and such disagreements as may be disclosed by the disputed information could not possibly be described as being of great constitutional significance: those considerations would all tend to weaken the public interest in maintaining both the section 35 exemptions.

(6) We recognise that there may have been (and may still be) on-going wider policy issues and discussions within government about whether certain categories of people (and in particular part-time fee-paid judicial office-holders) should or did come within the concept of "worker" in various pieces of domestic and/or European legislation so as to benefit from employment rights provided by such legislation, although, as we have said the evidence about this was somewhat vague. This was a relevant consideration in considering the public interest balance but was not a strong one in our view, given that the wider issues were likely to remain in existence for a very long time and that the coverage of each piece of EU employment legislation in the end would depend on the goals of the particular piece of legislation and the way it was drafted and that there has never been any issue within Government, as far as we know, that part-time fee-paid judicial office-holders should not, so far as possible, come within the scope of the Framework Agreement or benefit from any of the rights given by Council Directive 97/81/EC.

(7) Mr O'Brien stated in the course of the hearing that he was content for the identities of individual civil servants to be redacted (but not their positions); if that step had been taken (and we shall now require it) it would have to some extent alleviated any concern about individual civil servants being singled out by the press or their political masters: in the context of this case this is a

fairly minor point but, so far as it goes, it tends to weaken the public interest in maintaining the section 35 exemptions.

(8) As to the information covered by legal professional privilege, we set out relevant considerations under Rider D in the Annex, which can be read into the decision at this point.

39. It follows from our conclusion on the statutory question that we consider the Commissioner's decision to have been wrong and we therefore allow Mr O'Brien's appeal.

Remedies

40. We will give the Department a month to communicate the disputed information to Mr O'Brien which will give them time to consider an appeal against this decision. As we have already indicated the names of individual civil servants (and their direct line telephone numbers and email addresses, but not their positions) should be redacted from the documents. We have also identified some parts of the documents comprising the disputed information (para 4 of B7 and para 4 of B9) which do not seem to us to be of the description specified by Mr O'Brien in his request which can also be redacted.

41. As we have mentioned under Rider A in the Annex it seems to us that there may well have been documents coming within the terms of Mr O'Brien's request in addition to documents B1 to B12. We therefore require the Department to use best endeavours to find and retrieve such documents and supply such documents to Mr O'Brien or to the Commissioner if, in the light of this decision, they still seek to rely on any exemption.

Finally

42. Finally, we wish to record our thanks to all counsel (including Mr O'Brien) for their hard work and helpful submissions, both written and oral.

43. Our decision is unanimous. Lest there be any doubt we record here that no objection has been taken to the constitution of the Tribunal, which consists of part-

time fee-paid judicial office-holders, although the point was expressly raised with the parties at the directions hearing on 13 May 2008.

Signed

Deputy Chairman

Murray Shanks

Date 7 October 2008