



Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2008/0011

Information Commissioner's Ref: FS50082127

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:

The Appellant in person

For the Respondent: Ms Proops

For the Additional Party: Mr Havers QC

Decision on the Preliminary Issue

The Tribunal decided, having regard to the High Court's ruling upholding the Tribunal's decision on these matters (EA/2008/0011) and following examination of the new material within the terms of the order of the High Court issued on 19 February 2009, that there is no lawful basis upon which section 35 FOIA may be relied upon by the Additional Party in relation to the residual information. In light of this, the Tribunal substitutes the following decision notice in place of that dated 8 January 2008.

SUBSTITUTED DECISION NOTICE

Dated: 22 May 2009

Public authority: Department for Business, Enterprise and Regulatory Reform

Address of Public authority: 1 Victoria St, London SW1 OET

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 following information to the complainant. The information set out below represents that which must be disclosed. The remainder of the information in the documents in question need not be disclosed (either because it represents names which are subject to section 40 or is out of scope of the request).

- a) document B14 – the whole of the letter dated 29 December 1999 from Lord Irvine of Lairg to Stephen Byers .
- b) in document B15 - submission of 17 January 2000 from the Economic and Domestic Secretariat in the Cabinet Office to the Chancellor of the Exchequer: paragraph 1, 3 without the fax cover sheet (first two sentences and last bullet point), 4 (first sentence) and 6
- c) in document B16 - draft letter from the Chief Secretary to the Treasury to the Secretary of State for Trade and Industry: paragraphs 1, 2, 3 (insofar as it refers to the letter of 13 December and a letter from "Derry Irvine"), 4 (except the first four words) and the penultimate two paragraphs of an undated letter to Stephen Byers
- d) in document B24 - draft submission on the outcome of the part time work consultation dated 20 March 2000: third and fourth paragraph of the e mail and in the attached memorandum dated 17 March 2000 paragraphs 6-9 and in Annex A, the entry on page 8 vis "Lord Chancellor's Dept – Lord Irvine of Lairg" and the second and third line of the first "Comments" box of page 9
- e) in document B27 - letter dated 4 May 2000 to Stephen Byers: paragraphs 1, 2, 3 (first five words), 4 (last two sentences), 9 and 10

Action Required

The public authority must communicate the above information to the complainant by 29th May 2009.

Signed:

Dated 22 May 2009

Decision

1. This preliminary hearing arises further to a request made by Mr O'Brien QC to the Department for Business Enterprise and Regulatory Reform ("BERR") for information relating to the exclusion of part-time judicial office holders from the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the Regulations"). This letter of request, dated 13 April 2005 was refused, an internal review upheld the refusal, and this refusal was upheld by the Information Commissioner. The matter eventually came before a differently constituted Information Tribunal, on appeal, on 7 October 2008. That Tribunal issued a decision by which it allowed the Appellant's appeal against the Commissioner's decision that the particular information was exempt from disclosure under sections 35 (ministerial communications) and/or section 42 Freedom of Information Act 2000 ("FOIA") (legal professional privilege).
2. BERR appealed the Tribunal's decision to the High Court. The appeal was allowed, but only in respect of the Tribunal's conclusions on the application of section 42; the High Court dismissed BERR's challenge to the Tribunal's decision on the application of section 35. The High Court remitted to the Tribunal the question of whether BERR had been lawfully entitled to withhold that information in respect of which the section 42 exemption had been claimed ("the section 42 information").
3. The preliminary hearing was not concerned with the section 42 information. Instead, it was concerned with certain information which was identified by BERR for the first time after the Tribunal hearing ("the new information" – 16 documents in total). The High Court ordered that the newly constituted Tribunal should consider as a preliminary issue whether '*having regard to the Information Tribunal's decision (EA/2008/0011), the judgment given on the hearing of this appeal and the nature of the new information, there is a lawful basis upon which the Tribunal could conclude that the new information was exempt from disclosure under section 35(1)(a) or (b)*'.
4. In the event, it was in relation to only five of the documents making up the new information that BERR was seeking to place reliance upon the section 35 exemption: these were documents B14, B15, B16, B24 and

B27. It was clarified during the course of the hearing that BERR was not relying upon section 35 in relation to B18 (which now properly falls within the section 42 information). It was also clarified at the preliminary hearing that the withheld information in one of the originally disputed documents, B8, was being withheld under section 42 only. BERR was no longer seeking to rely upon section 35 in relation to any part of that document.

Scope of Request

5. Also in issue at this preliminary hearing, and necessarily dealt with first, was the correct scope of the letter of request dated 13 April 2005. This arose in relation to the new information in the 16 documents, uncovered after the original Tribunal, as it was said by BERR that within these, a good deal of information was beyond the scope of the letter of request and therefore beyond the jurisdiction of the Tribunal. The Appellant's original request was for disclosure of the following information:

'all documents relating to the inclusion of what became Regulation 17 including, but not limited to, all letters, memoranda, emails, minutes and drafts produced internally or passing between DTI and the Lord Chancellor's Department/Department for Constitutional Affairs and/or the Treasury and/or the Department for Work and Pensions and/or any other person or body relating to the form or, the reasons and justifications for and/or validity of regulation 17'

6. The Tribunal noted that the request was narrow in the sense that it related to the "inclusion of regulation 17" and not the entirety of the Regulations, but noted also that the generality of the request was illustrated but not limited by its request for information as to *the "form, or the reasons and justifications for and/or validity of regulation 17"*. Thus, in its view, the request covered both the substantive reasons for regulation 17 and also the process and timing whereby it was included in the Regulations.
7. As a starting point, the Tribunal had regard to the indications given by the previous Information Tribunal on its view on scope. It noted that at paragraph 40 of its Decision, it ordered that paragraphs 4 of B7 and B9 should not be disclosed as not being within the scope of the letter of request. There was no reasoning given for this and no indication that the matter was argued before the Tribunal. In these circumstances, this Tribunal, whilst finding these two pointers of use, did not consider itself unduly constrained in its determination on scope. As the information in the two documents mentioned here was not disclosed, our further reasoning on this is contained in a confidential annex at Rider A.
8. The IC, in the event, agreed with BERR on what fell within and without of scope of the letter of the request. BERR's main argument was that

information that related to other aspects of the Regulations or the Regulations as a whole, in such a way as to have no direct bearing on regulation 17, could not be said to “relate to.....the inclusion of regulation 17”. Mr O’Brien QC invited the Tribunal to take into account that various issues, whilst not presenting expressly as related to regulation 17, nevertheless had a critical bearing on the need for and the form of the eventual exclusion for part-time judicial office holders. In particular, the Tribunal had regard to the Appellant’s submissions on whether the Regulations should be directed at “employees” or “workers”. As a consequence it decided that certain information (see document B24), argued to be out of scope, was in fact within (and further to its decision on the preliminary issue, should be disclosed). Mr O’Brien QC raised other issues such as remuneration and comparators but these matters either did not feature within the new information or were not, in the Tribunal’s view, linked to the ‘inclusion of regulation 17’ issue. In this regard the Tribunal took care to note Mr O’Brien’s submissions with regard to the consistency of approach by Government as to different kinds of office holder. The confidential annex at Rider B explains in further detail the Tribunal’s decision with regard to the information ruled to be outside the scope of the letter of request.

9. The information held to be within scope and in relation to which BERR was seeking to rely upon section 35, was then considered by the Tribunal for the purposes of the preliminary issue as set down by the High Court judge. At the preliminary hearing, this was referred to as the ‘residual information’ and this Tribunal adopts that terminology for purposes of clarity.

The preliminary issue and the residual information

10. Thus, the question before the Tribunal was whether there was any lawful basis, taking into account the decisions of the original Information Tribunal and the High Court, to find that BERR could rely upon section 35 exemption in relation to the residual information. The residual information was contained within the following five of the 16 documents: B14, B15, B16, B24 and B27.

11. The Tribunal approached this issue by asking itself the following questions:

- a. whether there is a lawful basis for concluding that section 35 is engaged in respect of the residual information; and if so
- b. whether, having regard to the Tribunal’s decision, the High Court’s judgment and the residual information itself, that information is so qualitatively different from the ‘section 35’ information which Wyn Williams J ordered should be disclosed that there is a lawful basis upon which the Tribunal could conclude that the residual information is exempt under section 35. All parties agreed that, as a matter of logic, this approach would in effect determine the preliminary issue. Thus, if there

was no qualitative difference in the content of the two sets of information, then it would follow that the public interest considerations would be the same and therefore the outcome of the balancing test as carried out by the original Tribunal would apply with equal force.

12. The Tribunal had no hesitation in concluding that section 35 was engaged in relation to the residual information. Section 35 provides:

'35(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications'

13. Neither BERR nor the IC argued that section 35 was not engaged, and the Tribunal, on consideration of the residual information found that it either related to the formulation or development of government policy or Ministerial communications.

14. For the purposes of the question set out in paragraph 11b above, the information against which the residual information was to be compared was that contained within B1, B5, B9 and B11 of the original information ('the original section 35 information'). These documents consisted of communications between Ministers and documents outlining the arguments and rationale for and against inclusion of regulation 17, both before and after the introduction of the Regulations.

15. BERR's essential argument was that the residual information was so anodyne in content that it was qualitatively different to the original section 35 information. This, it was said, meant that one could not apply the public interest considerations as identified in the original Information Tribunal's decision in the same way. This Tribunal's attention was drawn to paragraph 38 of the original Tribunal's Decision at which it set out the main considerations for the purposes of the public interest test. BERR argued that the residual information was so devoid of useful content that the considerations identified in subparagraph (3) could not be said to apply with the same force. Sub-paragraph (3) of paragraph 38 of the Decision stated:

"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 the lessons for the future, as well as helping those affected by the decision to make representations about it even after the event."

16. The IC argued conversely that the residual information was far from anodyne in content. Some of it went to completing the picture in terms of process (a 'course of correspondence') and in particular gave information as to the timing followed. In this regard, the IC drew attention to the public interest consideration highlighted specifically by the original Tribunal in paragraph 38(1)(c) (vis that regulation 17 had been "slipped in").
17. The Tribunal carried out a comparative analysis of the two sets of information. B14 was a letter from Lord Irvine of Lairg to Stephen Byers, in fact a follow up, 'chasing letter' to the letter at B1. B15, B16 (a minute and draft letter prepared by the Economic and Domestic Secretariat in the Cabinet Office) and B27 (a letter from the Chief Secretary to the Treasury, on behalf of the Chairman of the Economic Affairs Committee of the Cabinet, summarising the outcome of Ministerial correspondence) were what might be called records of the proceedings in Cabinet. Part of these documents contained residual information and the Tribunal considered therefore whether there was a qualitative difference in the nature of this information to the original section 35 information.
18. The Tribunal noted that it was not argued before it that the mere fact that these were records of written proceedings of a Cabinet Committee gave rise to such a difference. Thus, neither BERR's skeleton argument nor the oral submissions from both BERR and the IC at the preliminary hearing, touched on this as a basis for concluding that there was a difference in content. The Tribunal did note that there was oblique reference to this issue in BERR's written submissions on the public interest considerations against disclosure insofar as it referred to the Ministerial Code. This was the only way, however, in which this issue was raised, such that Mr O'Brien would have been at a distinct disadvantage had this been pursued in closed session or the Tribunal had given this any weight of its own accord. In these circumstances, it did not consider it appropriate to give any weight to this potential difference. In any event, it noted that the final paragraph of B1 was an indication that that letter had been part of the Cabinet process, thereby diminishing any difference there may have been.
19. In its analysis of difference then, it noted that B15, B16 and B27 essentially set down the responses of Cabinet members to the draft Regulations. The residual information contained within these documents, indicated the process followed in the Government moving towards inclusion of regulation 17 in the Regulations.
20. Finally, the Tribunal considered B24 which was an email and memorandum from an official to a Minister, Alan Johnson and the Secretary of State. The residual information within this memorandum all concerned either timing, the "employee/worker" issue or the response of consultees on matters within scope of the request.

21. BERR also raised as a relevant matter for the preliminary issue that certain of the Ministers involved are still in Government. It has been accepted by this Tribunal (for example in *Scotland Office v ICO* (EA/2007/070) paragraph 87) that the fact whether Ministers are still in office or in politics may be one among many relevant factors in the application of the public interest test to information falling within the ambit of s35(1)(b). In its list of relevant circumstances in determining the initial appeal in this case, the Tribunal noted at paragraph 29 (5) that “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.” It does not appear that this was a significant factor in their decision, and the extent of revelation of personal views of still serving Ministers in the documents at issue in the new information happens to be slight, once redactions on grounds of scope have been made. The Tribunal took the fact that certain Ministers are still in Government into account but did not consider this warranted any significant weight or that it amounted to a qualitative difference for the purposes of the preliminary issue.
22. It was the Tribunal’s considered view that none of the residual information fell into BERR’s ‘anodyne’ description. It all went to complete a picture in terms of process followed and information as to timing. As noted above, the timing issue was key to how regulation 17 was included (vis, it appears that one of the drivers was the perceived deadlines for introduction of the Regulations). Process and timing were both aspects of the information which, in the view of the Tribunal, would go to “*confirm or dispel such concerns and to provide the lessons for the future*” (per paragraph 38 of the previous Tribunal’s Decision). This was even more clearly the case in relation to the substantive discussions in paragraph 6 – 9 of document B24.
23. This Tribunal has decided that there is no qualitative difference between the two sets of information and therefore that the conclusions of the previous Tribunal in relation to section 35 apply with equal force to the residual information. This Tribunal has considered whether there is a lawful basis upon which it could be argued that section 35 could apply. It was clear that it had been very much in the High Court judge’s thinking that, unless there was a real difference between the two sets of information, BERR should not have a ‘second bite of the cherry’ in seeking to argue again that section 35 applied.
24. It follows that the Information Commissioner, had he been aware of the existence of the residual information should have decided, in his Decision Notice, that it ought to have been disclosed. In this sense the Decision Notice was not in accordance with law. Thus, this Tribunal has issued a Substitute Decision Notice ordering its disclosure. That we have chosen this course of action, rather than issuing a Substitute Decision Notice at the end of the full hearing, is because it is appreciated that Mr O’Brien may wish to rely upon the residual

information in support of his arguments on section 42 at the full hearing.

25. Finally, sent out prior to this decision are further directions for the full hearing. At the preliminary hearing there was argument over the nature of the evidence to be before the resumed hearing and in particular in relation to that of Mr Hilton. The Tribunal wished to emphasise that it would be rehearing the section 42 point afresh and did not intend therefore to constrain the parties in relation to the evidence it wished to put before it. That said, it would be open to Mr O'Brien to cross-examine Mr Hilton, if he is called, or to refer the Tribunal to the terms of the previous Tribunal's Decision insofar as it recorded its views on Mr Hilton's oral evidence.

26. This decision is unanimous.

Signed:

Melanie Carter
Deputy Chairwoman

Dated: 22 May 2009