



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0214

**Determined, by consent, on written evidence and submissions
Considered on the papers on 28 March 2019**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Anne Chafer
and
Ms Marion Saunders

Between

Daniel Edwards

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

THE REQUEST

1. The Appellant wanted to see any legal advice the Department for Education (DfE) holds in relation to the legality of section 444 of the

Education Act 1996. This relates to parents who take their children out of school to visit relatives overseas.

2. On 3 March 2018, the complainant wrote to the DfE and requested information in the following terms:

“Has the Department for Education received legal advice on the legality of section 444 of the Education Act for parents who take their children out of school to visit relatives overseas given Article 8 of the European Convention of Human Rights restricts state interference in a citizen's right to a family life? If so, what was that advice?”

I understand the DfE may be inclined to refuse my request given the nature of the legal advice but given that parents can be prosecuted and fined/jailed under section 444 there is an overwhelming public interest in disclosure.”

3. The DfE responded on 4 April 2018. It stated that it held the requested information but considered that it is exempt from disclosure under section 42 FOIA. On 13 May 2018 the Appellant contacted the Commissioner to complain about the way his request for information had been handled. The Appellant argued that the DfE had not given sufficient weight to the public interest in favour of disclosure. As there is no right to appeal a penalty notice served under section 444 Education Act 1996 and the ultimate sanction is imprisonment, the Appellant considers it is in the public interest to disclose legal advice on which the DfE has relied.

SECTION 42(1) FOIA

4. Section 42 FOIA states that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt information. However, this is a qualified exemption which means that in addition to demonstrating that the requested information falls within the definition of the exemption, there must be consideration of the

public interest arguments for and against disclosure to demonstrate in a given case that the public interest rests in maintaining the exemption or disclosing the information. Section 42(a) FOIA reads as follows:-

42. – Legal professional privilege.

(1) Information in respect of which a claim to legal professional privilege... could be maintained in legal proceedings is exempt information.

5. There are two types of LPP; advice privilege and litigation privilege. The type of LPP which has been claimed in this case is advice privilege. In her decision notice dated 1 October 2018 the Commissioner says that she has reviewed the withheld information and is satisfied that it consists of ‘confidential communications between a DfE official and two DfE lawyers concerning its position on section 444(1) of the Education Act and Article 8 of the ECHR. The pre-dominant purpose of these communications is the seeking and obtaining of legal advice’. We have also reviewed the withheld information and have reached the same conclusion.
6. The Commissioner was satisfied that the withheld information is subject to LPP and section 42 of the FOIA is engaged. We are of the same view. The Appellant does not seek to challenge the view of the Commissioner (and of course it is hard for him to do that as he has not seen the material). This case is really about whether the public interest test favours disclosure over the withholding of the material.

THE DECISION NOTICE AND THE PUBLIC INTEREST TEST

7. In the decision notice the Commissioner recorded the DfE view on the public interest test. Thus, the DfE understood there is a public interest in openness and transparency and recognised how this can improve the

standard of public debate and trust. However, the DfEe listed the following factors that meant there were stronger public interest arguments in favour of maintaining the exemption:-

- (a) The need to maintain lawyer-client confidentiality.
 - (b) The ability of officials to consult lawyers in confidence to obtain effective legal advice in a safe forum without the fear of disclosure.
 - (c) The fear of potential public disclosure would reduce the candidness of the advice sought and the consideration and assessment of potential risks.
 - (d) Government departments need to have access to high quality and comprehensive legal advice in order to take decisions in a fully informed context.
 - (e) Government legal advisers need to be able to set out the arguments for and against a particular line without the fear that this might expose weaknesses in the government's position.
 - (f) It has been recognised by the courts generally and the First-tier Tribunal (FTT) that there is a very strong public interest in protecting information and documents which are subject to LPP from disclosure.
 - (g) There is nothing in the withheld information or the circumstances relating to them which would justify setting aside the very strong presumption against disclosure of LPP material.
8. The Commissioner also recorded the DfE's disagreement with the Appellant's points about the importance of section 444 Education Act 1996 and the fact that it can lead to criminal sanctions; and that a legal challenge could be avoided by disclosure of the requested advice. The DfE's view is that whether or not s444 Education Act 1996 is compatible with Article 8 ECHR is an issue that, ultimately, only a court can determine.
9. The conclusion on the public interest test by the Commissioner is as follows:-

29. The Commissioner considers the DfE has underestimated the public interest in favour of disclosure in this case.... [T]he Commissioner considers the matter of taking children out of school during term time affects a significant amount of people. There are clearly differing views on whether parents should be able to take their children out of school for certain reasons within defined boundaries and whether they should not. There is also the more recent introduction of fines for doing so and the ability of head teachers to exercise their discretion on authorising absences (albeit in exceptional circumstances) and whether to issue a fine. Access to information which will enable members of the public to understand more clearly the government's thinking in this regard is of notable interest to many and would aid public debate.

30. That being said the Commissioner acknowledges that where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption simply because we are talking about the long standing, important principle of LPP and the clear and important need for all (not just the public sector) to have access to free, frank and candid legal advice. Only in very exceptional cases can this be overridden when considering where the public interest lies. Whilst the legal advice and the matter to which it relates is of interest to the wider public and in particular those parents that do have children in UK schools the Commissioner does not consider this case is exceptional to rule in favour of disclosure.

...

32. For the above reasons, the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exemption.

THE APPEAL

10. The Appellant's appeal is dated 5 October 2018. He raises the following points in relation to the operation of the public interest test:-

- (a) There is evidence that disclosure of information concerning advice by civil servants to ministers does not affect the quality of the advice

given, and there is no reason why the same should not be true of legal advice provided to ministers.

- (b) Failure to provide the information will lead to a legal challenge, whereas disclosure could avoid this 'if sound advice has been given'.
- (c) Given the severity of the punishments available and the effects this can have on families, the public interest 'in this case must come above the government maintaining secrecy over the legality of this legislation' and an absolute exemption should not be created. These points are repeated on a number of occasions in the appeal document.
- (d) The operation of the legislation costs more than it recoups in fines and as it is a burden on the public purse 'the public has the ultimate right to know'.
- (e) Prosecutions would not occur if the advice 'determines that prosecutions in certain circumstances are not compliant with Article 8'.
- (f) If the government legal advice is no more authoritative than independent legal advice would be, then LPP should be given little weight if the advice is, in fact, easily available.

11. The Commissioner has responded to the appeal. The importance of LPP at common law is highlighted, but it is also recognised that s42(1) FOIA is only a qualified exemption. The High Court case of *Department for Business Enterprise and Regulatory Reform v O'Brien* [2009] EWHC 164 (QB), is referred to, which cites the 'in-built public interest in withholding information' to which LPP applies. We will return to this case below.

12. The Commissioner does not agree with the Appellant's appeal grounds on the public interest test. The Commissioner also points out that that the balance in favour of non-disclosure is even more likely where the information might be used in contemplated legal proceedings (*Savic v IC* [2017] UKUT 534 (AAC)). The Commissioner does not think that disclosure will prevent litigation.

13. Finally, the Commissioner expresses the view that, contrary to the position in the decision notice as set out above, not all of the information provided by the DfE as within scope of the request, is in fact within scope. Additional reasons for maintaining the public interest in favour of non-disclosure are contained in a confidential annex.
14. In a reply, the Appellant emphasizes the importance of Article 8 and the seriousness of obtaining legal advice if the purpose is to further an illegal activity or violate Article 8 rights.
15. We would refer to two other documents. The first is a letter from the DfE to the Information Commissioner dated 12 December 2018. In that letter the DfE comment that 'the information in scope of the request is extremely limited in nature and would not serve the purpose of Mr. Edward's request as we understand it'. The second is an email from the Commissioner to the Appellant on 13 December 2018, and confirms that the Commissioner's view is the same as that of the DfE.

DECISION

16. The decision notice suggests that only 'in very exceptional cases' can the public interest in favour of LPP be overridden. We do not think this is the right test. The Commissioner, in fact, in her response referred to the case of *O'Brien* in which, in our view, the correct test is set out in paragraphs 41 and 53:-

41. ...A person seeking information from a government department does not have to demonstrate that 'exceptional circumstances' exist which justify disclosure. Section 42 is not to be elevated 'by the back-door' to an absolute exemption. As Ms Proops submits in her Skeleton Argument, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being

withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA . Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

53.....Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

17. Having seen the material in this case it is our view that LPP attaches to it. Indeed, the Appellant, in his request, is specifically interested in legal advice to which LPP would attach. As we have said, the important issue in this case is the application of the public interest test. We will apply the approach set out in *O'Brien*.
18. Thus, when considering the public interest test we must 'give effect to the significant weight to be afforded to the exemption in any event' and we do this. As was recognised in *O'Brien*, for the purposes of this Tribunal this is an 'in-built' public interest which has essentially been pre-established by the common law.
19. Next we must consider any particular or further factors that could point to non-disclosure. The Commissioner has raised the point that greater weight might be given to non-disclosure if litigation is contemplated. In this case we do think that is a factor to be given some weight: as can be seen from the Appellant's grounds of appeal, DfE must have some reason to believe that litigation around the use of s444 Education Act 1996 and its compliance with Article 8 might happen in the foreseeable future.

20. We then must consider any features supporting disclosure. We recognise the underlying public interest in disclosure and openness and we take those into account. There is a public interest in as much information being in the public domain as possible.
21. In relation to the Appellant's points that failure to disclose will lead to litigation, and that disclosure would avoid this if the advice is 'sound', we do not think that this should be given significant weight when considering the balance of the public interest.
22. Whatever is contained in the advice, it is only a view or opinion on the law, and might be right or wrong (or might not express a clear view at all). If (as suggested by the request itself) there are arguments that the legislation, as passed by Parliament, is incompatible with Article 8, then only a Court can declare that to be the case and it does not seem to us that disclosure of the advice would have a significant affect on whether there is litigation or not, nor its outcome.
23. If there are arguments that the operation of s444 Education Act 1996 may breach Article 8 in some individual cases (for example the right to respect to family life), then whether that is right or not will turn on the individual facts of the case, and advice which does not refer to those individual facts will necessarily be of limited value.
24. The Commissioner gave some weight (more than the DfE) to the public interest in disclosure because of the sanctions available against those who breach s444. We agree that where members of the public face sanctions because of the operation of legislation and the government has legal advice on whether there is a breach of Article 8, then there is a public interest in disclosure. But the same points as set out above apply: the

advice is likely to be of little value if the aim is to challenge the legislation itself or to challenge the operation of the legislation in individual cases.

25. We place little public interest value on the point made that the operation of s444 is not cost effective: the legislation has a clear intention of ensuring attendance at school rather than to generate revenue.
26. We do not place public interest value on the point made that if independent advice would be just as authoritative as government advice, then LPP should not be attached to government advice as, effectively, the same advice is available to everyone. Whether or not the advice is from in-house lawyers or from independent lawyers, at common law the same LPP principles must apply.
27. In our view, although there is some public interest in disclosure, it has not been established that it is public interest of particularly great importance or value for the reasons we have expressed. Applying the approach in *O'Brien*, we find that the public interest in disclosure, on the facts of this case, falls a long way short of being of equal weight to the 'built-in' public interest of protecting LPP.
28. We should mention two further points.
29. Firstly, having viewed the non-disclosed material, we do not agree with the Commissioner's view (expressed in the response and not in the decision notice) that only some of it is within scope of the request. In our view all the material provided by the DfE is within scope.
30. Secondly, and again having viewed the material, we do agree with both the DfE and the Commissioner that the withheld information is not, in any

event, likely to serve the purpose of the request, as we understand this from the Appellant's request and appeal documents.

31. For the reasons set out above, the appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 25th April 2019.