IN THE FIRST-TIER TRIBUNAL
[INFORMATION RIGHTS] **Case No.** EA/2009/0077
GENERAL REGULATORY CHAMBER

ON APPEAL/APPLICATION FROM:

Information Commissioner's
Decision Notice No: FS50121838
Dated: 23rd June 2009

Appellant: Crown Prosecution Service

Respondent: Information Commissioner

Heard at: Holborn Bars London

Date on: 16th and 17th February 2010

Date of decision: 25th March 2010

Before

John Angel
(Judge)
Marion Saunders
and
Gareth Jones

Attendances:

For the Appellant: Mr Alan Bates
For the Respondent: Mr Ben Hooper

Subject matter: FOIA late claiming of exemptions; s. 35(1)(a) the formulation and development of government policy, s. 40(2) personal data and s. 42 legal professional privilege.

Cases: *Home Office & Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin) and EA/2008/0062, 20 November 2008**.**
Department for Business, Enterprise and Regulatory Reform v. O'Brien [2009] EWHC 164 (QB).
Jones v. MBNA International Bank, High Court, unrep., 30 June 2000.
Bowbrick v. Nottingham City Council, 28 September 2006, EA/2005/0006.
Scotland Office v Information Commissioner 8 August 2008 EA/2007/0070 and EA/2007/0128
Office of Government Commerce v IC [2009] 3 WLR 627
Guardian Newspapers & Brooke v IC & BBC EA/2002/0011 & 13
DBERR v IC & Friends of the Earth 29th April 2008 EA/2007/0072
Department for Education & Skills v IC 19th February 2007 EA/2006/0006
DBERR v IC & CBI EA/2007/0072
Secretary of State for Works & Pensions v IC 5th March 2007 EA/2006/0040

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice date 23rd June 2009 is substituted by the following notice.

SUBSTITUTED DECISION NOTICE

Dated 25th March 2010

Public authority: **Crown Prosecution Department**

Address of Public authority: **50 Ludgate Hill London EC4M 7EX**

Name of Complainant: **Norman Wells of the Family Education Trust**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal in part and substitutes the following decision notice in place of the Decision Notice dated 23rd June 2009:

1. That the information contained in Schedule A to the Confidential Annex be disclosed subject to the redaction of some personal data;
2. That the legal opinion(s) and references to such opinion(s) in Schedule B to the Confidential Annex be withheld; and
3. That the information in Schedule C to the Confidential Annex be disclosed.

Action Required

It is ordered that the relevant information should be disclosed to the complainant within 30 days of the date of this decision.

Dated this [ ] day of March 2010

Signed

Judge

REASONS FOR DECISION

Background

1. S. 58 of the Children Act 2004 amended the criminal law by restricting the availability of the common law defence of "reasonable punishment" to charges of battery only, and thus preventing it from applying to more serious offences against the person, such as assault occasioning actual bodily harm (commonly known as "ABH"). S. 58 had been introduced as an amendment to the Children Bill by Lord Lester, a Liberal Democrat peer, and it was subject to a free vote in Parliament. In straight forward terms, s. 58 recognises that a parent may legally smack a child, but that more serious punishments may lead to criminal liability.
2. In November 2004, the then Minister for Children (Margaret Hodge MP), promised to review the practical consequences of s. 58 two years after it came into effect. Following the enactment of s. 58, the Crown Prosecution Service ("the CPS") amended its Charging Standards for offences against the person to make it an aggravating factor for the victim to be a child assaulted by an adult, with the effect that more serious assaults on children would be more likely to be charged as ABHs (where a reasonable punishment defence could not be raised) than batteries (where such a defence would remain available).
3. Whilst the Children Bill was being debated in Parliament there was considerable controversy as to whether parents should be entitled to use force to discipline their children. The subject has remained controversial ever since.

The Request

4. On 14th July 2005 Norman Wells of the Family Education Trust made a request in three parts for information to the CPS. For the purposes of this case the first two parts have been dealt with and are not the subject of the appeal. The third part requested:

   The basis on which the CPS changed its position in relation to limiting the defence of reasonable chastisement to charges of common assault between 2002 and 2004. (In 2000, the CPS response to Protecting

Children, Supporting Parents, stated that it would be 'wrong' and 'unnecessary' to so limit the defence, while in the summer of 2004, it advised government ministers that it was 'comfortable' with such a change in the law.) Please would you confirm the level within the CPS at which this policy decision was made and supply any correspondence and notes of meetings at which the issues were discussed. (The "Request")

5. In summary Mr Wells requested information relating to an alleged change of position on the part of the CPS towards the merits of amending the criminal law relating to children being assaulted by adults.
6. The CPS refused the Request by letter dated 11th August 2005 on the basis that the information in question was exempt under s.35(1)(a) (formulation and development of government policy) of the Freedom of Information Act 2000 ("FOIA") without explaining how the public interest test had been applied.
7. Mr Wells requested an internal review on 17th August 2005 and on the 26th October 2005 the CPS let him know the outcome of its review which was to uphold its refusal again without explaining how the public interest test had been applied.

Complaint to the Information Commissioner (IC)

8. Further correspondence took place between Mr Wells and the CPS and eventually Mr Wells complained to the IC by letter dated 16 May 2006.
9. The IC eventually started an investigation and issued a decision notice on 23rd June 2009 ("the Decision Notice"). During the investigation the IC invited the CPS to look at the Request afresh in relation to the exemption claimed which it declined to do.
10. The IC accepted in his Decision Notice that all the information held by the CPS within the scope the Request was information that related to the formulation or development of government policy and that the qualified exemption under s.35(1)(a) FOIA was engaged. The IC, however, decided that the public interest balance weighed in favour of disclosure of all the information.

Appeal to the Tribunal

11. On the 27th August 2009 the CPS sought to appeal against the Decision Notice, some 37 days outside the 28 day time limit. In addition to continuing to rely on s. 35(1)(a), the grounds of appeal sought also to rely for the first time on the exemptions in s. 35(1)(b) (ministerial communications) and s. 42 (legal professional privilege) FOIA.
12. In the Ruling of 12th October 2009, the Tribunal concluded that it was "just and right" for the CPS's appeal to be accepted out of time. The CPS argued that there were a number of significant points of law which needed to be determined that amounted to special circumstances why it would be just and right for the Tribunal to allow the appeal out of time. The Tribunal ruled on 12th October 2009 that the position of s. 35(1) did not provide a sufficient ground to accept the appeal, not least given the established jurisprudence on the s. 35 exemption (§17). However, the appeal was accepted in relation to the s. 42 arguments and the question as to whether exemptions can be claimed for the first time before the Tribunal.
13. The appeal being allowed to proceed the CPS raised yet a further exemption under S.40 (2) (personal data) FOIA during the course of the proceedings.
14. Where a decision notice has been served by the IC, the complainant may appeal to the Tribunal against the notice under s. 57 of FOIA. The Tribunal's jurisdiction on appeal is governed by s. 58:

> "(1) If on an appeal under section 57 the Tribunal considers—
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

It is well-established that whether the public interest in maintaining an exemption outweighs the public interest in disclosure is a matter of law or,

alternatively, of mixed law and fact; and the Tribunal may substitute its own view for that of the IC as to where the balance should be drawn.[1]

Late claiming of exemptions

15. The Tribunal dealt with the preliminary issue, as to whether the three new exemptions could be claimed in this case, at the commencement of the hearing.
16. The Tribunal was somewhat surprised that Mr Bates, on behalf of the CPS, had chosen not to make any submissions in his skeleton arguments on this matter, appearing to assume that the Tribunal would automatically accept the late claiming of exemptions. In fact the first time the Tribunal was made aware of which information the new exemptions were being said to apply was shortly before the hearing when the Tribunal received a closed bundle of the disputed materials ("the Disputed Information").
17. At this point we would say that from the papers before us it is clear that the CPS has not handled the Request, complaint to the IC and appeal to us in the professional way that one would expect from a body like the CPS which is meant to be experienced in litigation practice.
18. The Tribunal has established jurisprudence on the issue of the late claiming of exemptions. This has yet to be scrutinised by higher courts although in *Home Office & Ministry of Justice v IC* [2009] EWHC 1611 (Admin), Keith J did not disapprove of a considerable line of Tribunal decisions although declining the parties' invitation to rule on its correctness.
19. The applicable principles are set out in the Tribunal decision in *Home Office & Ministry of Justice v IC*, 20 November 2008, EA/2008/0062:

> "72. The Tribunal has considerable jurisprudence on the claiming of late exemptions. This was summarised by the Tribunal in *Department of Business and Regulatory Reform v IC & CBI* EA/2007/0072 at

[1] See *e.g. Secretary of State for Work and Pensions v. Information Commissioner*, 5 March 2007, EA/2006/0040 ("*DWP*"), at §22.

paragraph 42:

> The question for the Tribunal is whether a new exemption can be claimed for the first time before the Commissioner. This is an issue which has been considered by this Tribunal in a number of other previous cases and there is now considerable jurisprudence on the matter. In summary the Tribunal has decided that despite ss.10 and 17 FOIA providing time limits and a process for dealing with requests, these provisions do not prohibit exemptions being claimed later. The Tribunal may decide on a case by case basis whether an exemption can be claimed outside the time limits set by ss. 10 and 17 depending on the circumstances of the particular case. Moreover the Tribunal considers that it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude to their obligations under ss.10 and 17. This is a public policy issue which goes to the underlying purpose of FOIA.
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> 73. We endorse this finding even more so where exemptions are claimed for the first time before the Tribunal. We do not accept [the Appellants'] contention that we are obliged to accept the claiming of late exemptions under FOIA."

20. At §75 of *Home Office*, the Tribunal recognised the late s. 40(2) claim in that case as "exceptional". In particular, the appellants were permitted to rely on the s. 40(2) exemption on the basis that, "...unless we allow this exemption to be claimed in relation to names of some individuals in the disputed material then any order we might eventually make could breach the data protection rights of data subjects."
21. We wish to set out even more clearly why we agree with the approach taken by previous Tribunals to the late claiming of exemptions.
22. First, although ss. 10 and 17 of FOIA do not in themselves preclude public authorities from claiming late exemptions, they do indicate that

Parliament intended and expected public authorities to identify the exemptions upon which they wished to rely at the outset of the FOIA process (in particular, within 20 working days of the original request).

23. Secondly, where an exemption in Part II of FOIA applies, that merely permits a public authority to refuse to disclose the information in question. FOIA does not in any sense require exempt information to be kept from the public.

24. The third point is as follows:

    a. Parts IV and V of FOIA make specific provision for the enforcement of the obligations that FOIA imposes on public authorities by the IC and, where necessary, this Tribunal. In doing so, the statutory scheme identifies the IC and the Tribunal as bodies empowered authoritatively to rule on a public authorities' obligations under FOIA. Unless and until it is appealed to the Tribunal (or, exceptionally, challenged in the Administrative Court) a decision notice is not simply the IC's opinion on the extent of a public authority's obligations under s. 1(1): it is a binding adjudication on that point. Similarly, unless and until it is appealed, the Tribunal's determination as to what decision notice is appropriate in any particular case binds the public authority as to the extent of its s. 1(1) obligations.

    b. This means that although s. 2(2) is cast in objective terms, FOIA also makes clear that it is for the IC and, where necessary, the Tribunal to adjudicate on the extent, if any, to which s. 2(2) affects a public authority's duties under s. 1(1).

    c. In other words, the fact that s. 2(2) is cast in objective terms does not mean that a public authority has an absolute right to make a late claim to an exemption, or that the IC or Tribunal has no power to order disclosure where an exemption - that a public authority has not raised - might in fact apply.

    d. Thus if, in its discretion, the Tribunal refuses to entertain a late claim, that constitutes its formal and authoritative determination under the FOIA scheme of the significance of that exemption in relation to the public authority's obligations under s. 1(1).

e. Indeed, any argument to the contrary would prove too much. In particular, it would also mean that a public authority would have an absolute entitlement to raise a late exemption at any stage in any appellate proceedings, *e.g.* in the Court of Appeal (or in the Supreme Court). But any such suggestion would be contrary to the long-standing approach of the appellate Courts to new points being taken on appeal.[2]

25. Nor does *Department for Business, Enterprise and Regulatory Reform v. O'Brien* [2009] EWHC 164 (QB) suggest that s. 42 cases require any different or special approach because:
    a. Wyn Williams J's consideration of the s. 42 exemption in *O'Brien* was based on the express finding that the Tribunal's general approach to s. 42 was "entirely correct" (§39). There is thus no reason to suppose that *O'Brien* requires the Tribunal to rethink how it approaches late exemption claims in s. 42 cases;
    b. In any event, the fact that s. 42 involves an "in-built public interest in non-disclosure" that itself carries "significant" weight (*O'Brien*, at §41) is not a reason to conclude that different principles should apply to a late s. 42 claim than apply to other late exemption claims, including late claims to an absolute exemption. As to the latter, Parliament has in effect determined that the public interest in maintaining an absolute exemption (where it applies) will always outweigh the public interest in disclosure. So if the *Home Office* approach applies to cases where absolute exemptions are claimed late, the fact that s. 42 involves a "weighty" in-built public interest in non-disclosure cannot in itself make that approach inappropriate for late s. 42 claims.
26. Overall, The Tribunal finds it is wrong only to consider the public interest that may be served by permitting a public authority to claim an exemption late. There is also an important public interest in the public authority being required to identify all the exemptions that it wishes to rely on by - at the latest - the time of the IC's investigation. In particular, identifying all

[2] See *e.g. Jones v. MBNA International Bank*, unrep., 30 June 2000, *per* May LJ at §52 set

exemptions at the investigation stage:

a. assists in ensuring that any subsequent proceedings in the Tribunal are conducted efficiently, expediently and at reasonable cost, ensures that the complainant knows where s/he stands in the IC's investigation, and in any subsequent appeal (and thus can decide how best to pursue her/his complaint under s. 50 or protect her/his interests in any such appeal); and
b. ensures that in any subsequent appeal the IC knows where he stands, and thus can determine how best to respond to that appeal.

27. There is nothing novel in this. It is well-established that an analogous public interest militates against parties in civil litigation being permitted to take new points on appeal. In *Jones v. MBNA International Bank*, unreported, 30 June 2000 May LJ at §52 found:

> "Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be

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out in these reasons).

exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."

28. Returning to the question of whether to allow the late claiming of exemptions in this case we have had the opportunity to review the Disputed Information. We have decided, and this part of our decision was delivered in open court, that in all the circumstances of this particular case that:
    a. the s.35(1)(b) exemption should not be allowed because, inter alia, it has been claimed for only a very limited amount of information, which in any case is covered by s.35(1)(a) exemption and where collective ministerial responsibility can still be claimed as a public interest factor in favour of maintaining the exemption;.
    b. the s.42 exemption should be allowed to be claimed in relation to a particular legal opinion of outside counsel and references to it because, although the inbuilt weight of LPP is not a reason to conclude that different principles should apply to a late s. 42 claim than apply to other late exemption claims (see§25b above), in this particular case the likely significant strength of the public interest in maintaining the exemption where a government seeks legal advice on the formulation of a very controversial legal enactment persuades us that we should allow the exemption to be claimed late;
    c. The s.40(2) exemption should be allowed to be claimed in relation to the personal data of junior officials and the private contact details of more senior officials and non government personnel, because the sensitivity of the issues in this particular case could otherwise result in unfortunate consequences for such officials/personnel, but not in a way which allows the exemption to be claimed for details of the departments/organisations cited in the Disputed Information to be withheld.
29. Following from this determination the parties agreed to remove a large part of the information from the disputed bundle with a view to the CPS disclosing most of it, with some personal data redacted, and that some

information, where LPP was being claimed, would be withheld.

30. As a result the Tribunal was left with a much reduced bundle of Disputed Information to consider and the only matter at issue was whether the s.35(1)(a) exemption was engaged and if so how the public interest test would be applied.

31. However before turning to this issue the Tribunal has considered whether the IC, and in turn the Tribunal, is under a duty to consider exemptions that are not raised by the public authority.

Whether the IC is under a duty to consider exemptions that are not raised by the public authority?

32. In its Reply of 25 September 2009, the CPS states at §3(b) that the s. 42 exemption "was not expressly raised" by it during the IC's investigation. Further, it is said that Mr Wells' request "was one of the first requests that the [CPS] received after the coming into force of [FOIA]". The IC informs the Tribunal that:

    a. S.42 exemption was not raised by the CPS during the Commissioner's investigation;

    b. Mr Wells' request may well have been one of the first FOIA requests that the CPS received. However, when the CPS agreed to reconsider the information in question "*afresh*", and when it conducted that reconsideration, FOIA had already been in force for more than two years.[3]

33. In Ground (3) of its Grounds of Appeal, the CPS seeks to criticise the IC for "failing to appreciate that part of the Contested Material also engaged FOIA section 42".

34. As a differently constituted Tribunal held in the early case of *Bowbrick v. Nottingham City Council*, 28 September 2006, EA/2005/0006:

    " 46. ...the IC does not have a positive duty to look for exemptions that might have been claimed by the public authority, but have not been claimed by the authority. If a public authority fails to invoke a

[3] The CPS agreed to look at the information "afresh" in its email to the Commissioner's Office dated 3 December 2007 [*3/212*]. The results of that reconsideration were communicated to Mr Wells on 4 January 2008 [*3/217*].

particular exemption before the IC, and the Commissioner orders disclosure of the information, the public authority cannot then come to this Tribunal and say it was an error of law for the Commissioner to fail to put forward on our behalf a particular exemption which we did not put forward on our own behalf. If the public authority raises an exemption, the Commissioner needs to consider whether that exemption is applicable, but if the public authority does not raise an exemption, the Commissioner does not have a positive duty to look for exemptions on which the public authority might rely.

47. If the Tribunal were to find differently, then the whole basis of FOIA would be undermined. FOIA is not drafted to find ways to withhold information.

48. Moreover public authorities have discretion as to whether they wish to claim an exemption. Even if information could be exempt the authority does not have to invoke an exemption. In general, it is the public authority that is in a position to identify reasons why particular information may give rise to particular exemptions. It is the public authority that in the first instance is expected to carry out the balancing exercise between the public interest and disclosure and the public interest in maintaining an exemption. It is not the scheme of the Act that the Commissioner should have a general duty to consider the application of any possible exemption, even if not raised by the public authority."

35. The Tribunal went on, at §§49-51, to list various "exceptional" cases where the IC would be "entitled" to look for an appropriate exemption. Significantly, cases involving s. 42 were not identified as part of this list. This omission cannot have been anything other than intentional, given that s. 42 was a principal exemption that was being claimed late in *Bowbrick* (see §36).

36. Further, if the Tribunal's approach to late exemptions as set out in *Home Office* is correct, then *Bowbrick* must also be correct. In particular, if the IC were under a duty to identify each and every exemption that might apply in a particular case then a public authority would have an absolute entitlement to raise a new exemption in an appeal to the Tribunal on the

basis that the IC had committed a legal error by not applying that exemption in the public authority's favour.

37. For reasons analogous to those set out at §25 above, *O'Brien* does not alter this analysis.

38. Mr Hooper, on behalf of the IC, also makes the point that whilst it may be reasonably clear in some cases that a document could be legally privileged, this will by no means always be the case. The IC may, in his investigation, come across a document that reports Mr X's views on a particular issue. There may be nothing in the document to indicate that Mr X is a qualified lawyer rather than *e.g.* a general civil servant, and the public authority may not inform the IC of Mr X's status in this regard. This means that if the IC is under a legal duty to identify all documents that fall within s. 42 then he may commit an error of law in circumstances where it cannot sensibly be said that he should have acted otherwise. Such a result strongly suggests that no such legal duty arises.

39. We agree with this point and note that the CPS has not identified any case which suggests that the *Bowbrick* analysis is wrong, or that the s. 42 exemption is a special case that calls for different treatment.

40. We conclude that the CPS cannot convert its failure to identify the possible application of the s. 42 exemption into a ground of appeal.

41. That is not to say that there is an absolute bar on the CPS relying on s. 42 in the present appeal. It merely means that the CPS can only do so if it can first persuade the Tribunal to entertain its late claim under s. 42, by reference to the *Home Office* principles.

The statutory framework

42. Where an individual makes a request under s. 1(1) of FOIA for information held by a public authority, the public authority is in general under a duty to communicate that information to the individual in question: see s. 1(1)(b).

43. Various exemptions to this duty are set out in Part II of FOIA. The effect of those exemptions is governed by s. 2(2) of FOIA, which provides:

"(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

44. S. 35 (which sets out qualified rather than absolute exemptions) provides in relevant part:

"(1) Information held by a government department…is exempt information if it relates to—

(a) the formulation or development of government policy.."

The facts

45. Andrew Sargent gave largely uncontested evidence to the Tribunal in his capacity as a Deputy Director in the Department's Children and Families Directorate of the Department for Children, Schools and Families ("DCSF"). His responsibilities include aspects of national policy on the safeguarding of children. Between the period June 2008 and December 2009, he was head of Child Protection Division and then Deputy Director, National Safeguarding Delivery Unit. He was the Deputy Director within DCSF responsible for policy on physical punishment. However he was not in post at the time of the Request and no longer has responsibility for the particular policy area concerned, namely the 'reasonable punishment' of children (which he refers to as "smacking"), under s.58 of the Children Act 2004. Mr Sargent was in that post at the time of the commencement of the appeal by the CPS last year and is fully familiar with the policy issues involved.

46. He informed the Tribunal that the effect of s.58 was to remove the defence of reasonable punishment to any charge of assault occasioning actual bodily harm, wounding or grievous bodily harm under the Offences Against the Person Act 1861, or to a charge of cruelty to a child under the Children and Young People's Act 1933. The defence of reasonable punishment dates from 1860, when its characteristics were spelled out in judicial remarks (the phrase did not appear in statute).

Chief Justice Cockburn stated: “By the law of England, a parent ... may for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable.” It was left to the courts or juries to decide what is “moderate and reasonable” in the view of an ordinary person in any particular case, and this would therefore vary over time as people’s views altered. This meant that from 1860 to 2004, a parent charged with a crime relating to an assault on their child could raise the defence of reasonable punishment. Following the enactment of s.58, the defence of reasonable punishment could not be used unless the defendant was charged only with common assault, and the defendant was the parent of the child concerned (or a person acting *in loco parentis)*.

47. Following the change in the law, the CPS amended the Charging Standard on offences against the person, in particular the section dealing with common assault. The Charging Standard now states that the vulnerability of the victim, such as being a child assaulted by an adult, should be treated as an aggravating factor when deciding the appropriate charge. Injuries on children that would usually lead to a charge of “common assault” now could be more appropriately charged as “assault occasioning actual bodily harm” under s.47 of the Offences against the Person Act 1861 (on which charge the defence of reasonable punishment is not now available), unless the injury is transient and trifling, for example amounting to no more than a temporary reddening of the skin.

48. Therefore, Mr Sargent informed us, a parent cannot now claim the defence of reasonable punishment in proceedings brought for any injury sustained by a child which is serious enough to warrant a charge of assault occasioning actual bodily harm, wounding and causing grievous bodily harm, or cruelty to a person under 16. S.58 and the amended relevant Charging Standard mean that a parent who administers more than a mild smack could be charged with one of these more serious

offences in respect of which the defence of reasonable punishment is not available.

49. Mr Sargent went on to explain the political context. S.58 arose from an amendment proposed by Lord Lester of Herne Hill during the passage of the Children Act 2004. The Government allowed a free vote on his amendment, and Ministers voted in its favour in Parliament. The Rt Hon Margaret Hodge MP, then Minister for Children, in November 2004 made a commitment to review the practical consequences of section 58 (known as clause 56 during the passage of the Bill), two years after its commencement. She also made a commitment to seek the views of parents about smacking:

> "*I can give a clear commitment that two years after clause 56 comes into effect we will review the practical consequences of those changes to the law, and will also seek parents' views about smacking. We will lay a copy of the results before Parliament."*[4]

50. Mr Sargent informed the Tribunal that the review of s.58 was published in October 2007. The review indicated (§19) that it was based on a thorough evidence-gathering process, including a public consultation; a survey of a statistically representative sample of parents; research into the views of children and young people; additional evidence including a report from the CPS on the use of the defence of reasonable punishment; and field visits by DCSF officials to discuss the implications of s.58 in detail with members of local police forces, social service and prosecutors. In setting out the next steps the review concluded that the Government had fulfilled its commitment to review the practical consequences of s. 58, and had sought parents' views on smacking. In response to the evidence the report indicated that the Government:

> a. Would retain the law in its current form in the absence of evidence it was not working satisfactorily. The report noted that the law allows the police and prosecutors to act in the best interests of children, and s. 58 prevents the use of the defence of reasonable punishment in any proceedings for an offence of cruelty to a child or assault occasioning actual bodily harm against a child or inflicting grievous bodily harm against a child;

[4] Hansard, 2 November 2004, Column 263

b. Would do more to help with positive parenting. The report said that parents know their children best and are best placed to teach them how to behave, but the Government accepted that parenting was complex and parents should be made aware of the variety of techniques they can use to manage their children's behaviour;

c. Welcomed the bulletin issued by the CPS to all their staff reminding them of s.58 and where appropriate reminding them to bring it to the attention of courts, juries, and defence lawyers; and indicated that it would ask the CPS to continue to monitor the situation with regard to the use of the reasonable punishment defence;

d. Recommended that the police take similar action to the CPS and remind staff of s.58, particularly staff in Child Abuse Investigation Units.

51. Mr Sargent went on to say that despite s.58 and the review, smacking has remained an issue of great political sensitivity with the possibility that lobbies on either side of the debate might seek to table amendments to s. 58 in any subsequent Bill, and this in fact happened. Even following the conclusion of the review it was necessary in October 2008 for the then Minister for Children, Young People and Families, the Rt Hon Beverley Hughes MP, to issue a statement noting that "*Some colleagues and children's organisations are arguing that children 'enjoy less protection than prisoners' because parents are allowed to smack their children and that any form of physical punishment, such as a mild smack, is tantamount to an act of violence*." The Minister drew attention in her statement to the outcome of the 2007 review and indicated in that statement that the Government would not accept any tabled amendment to ban smacking in connection with the progress through Parliament of the Children and Young Persons Bill.

52. Mr Sargent says the significance of this is that it demonstrates the continuing public interest in changing what Ministers consider is settled and effective law. The 2007 review found no evidence to suggest that the 2004 law was not working satisfactorily and that the majority of parents did not favour a ban on smacking. The Department, Mr Sargent says, is therefore concerned that attempts will be made to table amendments to the recently tabled Children, Schools and Families Bill either to reverse or modify the position established by the 2004 Act or, as in 2008, to ban

smacking altogether. In fact one amendment had already been tabled at the time he gave evidence which seeks to amend s.58 and limit the availability of the defence to those who have parental responsibility for the child.

Formulation and development of government policy

53. In relation to the s.35(1)(a) exemption the first question we have to ask is whether the exemption is engaged in this case. It is clear to us on Mr Sargent's evidence that the formulation and development of government policy in relation to the reasonable chastisement defence continued until the passing into law of s.58. This is accepted by Mr Hooper on behalf of the IC.

54. The Request set out in §4 above relates to information in respect of the formulation and development of government policy in relation to the reasonable chastisement defence during the period 2002 to 2004. The outstanding Disputed Information relates to this period. We therefore find that the exemption is engaged in relation to this information.

55. What is in dispute is whether the development of government policy in relation to the reasonable chastisement defence continued after the Children's Act 2004 received the Royal Assent, in particular at the time of the Request.

56. The reason this point is important is because the IC and the Tribunal have recognised that government needs a 'safe space' in which to formulate and develop policy. The strength of the public interest in favour of maintaining the exemption will be stronger during that period.

57. All parties seem to agree with the principles set out by a differently constituted Tribunal in §75 of *Department for Education and Skills v Information Commissioner*, 19th February 2007, EA/2006/0006 ("*DfES*") which many other Tribunals have endorsed[5] are the ones that we should

[5] These principles were specifically endorsed by the Tribunal in the later cases of *Secretary of State for Works and Pensions v Information Commissioner* EA/2006/0040 (*DWP)* (at §110),

be considering. The relevant passages are as follows:

> "(i) The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.
>
> ...
>
> (iii) Subject to principle (iv), which we regard as fundamental, the purpose of confidentiality, where the exemption is to be maintained, is the protection from compromise or unjust public opprobrium of civil servants, not ministers. Despite impressive evidence against this view, we were unable to discern the unfairness in exposing an elected politician, after the event, to challenge for having rejected a possible policy option in favour of a policy which is alleged to have failed.
>
> (iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity....
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due

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and *Scotland Office v Information Commissioner* EA/2007/0128 (the 1st *Scotland Office* case) (at §49). See also Stanley Burnton J at §79 of *Office of Government Commerce v Information Commissioner* [2009] 3 WLR 627 (*OGC)*.

course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances."

58. The CPS suggest that the Request was received at a time of policy development. Mr Bates', on behalf of the CPS, principal argument against disclosure relies on §75(iv)-(v) of *DfES* that whilst the policy formulation behind s. 58 was competed when the Children Act 2004 was passed in November 2004, the "development" of policy continued until the publication, in October 2007, of the review to which Margaret Hodge MP had previously committed the government. Thus, the CPS's case, is that the Request (dated 14 July 2005) was made during the development phase of the policy and the information in question needed to be withheld so as to allow ministers and officials the requisite "safe space" for their deliberations.
59. Mr Sargent in cross-examination reinforced his view that policy development was still continuing at the time of the Request although he was not in office at the time. He gave as a reason for this that the CPS and lobby groups were gathering evidence at the time, although he could provide no evidence that the government was itself gathering any evidence at the time.
60. Before dealing with this, Mr Bates in his final submission to the Tribunal seemed no longer to be contending that there was ongoing policy formulation and development at the time of the Request.[6]
61. On the other hand he also referred to the European Court of Human Rights decision in A v UK (1999) 27 EHRR 611 which he submits is the background to s.58 policy which started after that decision and he argues continues to the present day. We note there is no reference in the

[6] Page 34 lines 19 to 21 Transcript Wednesday 17 February 2010 10.30 a.m. open session.

October 2007 Review report to the A v UK case requiring consideration (or reconsideration) of policy in this area.

62. In any case we find Mr Bates' submissions confusing.

63. However we find the following facts:

    a. The Children Act 2004 contained no "sunset clause" in relation to s. 58. Nor was there any power to make delegated legislation to affect the scope of s. 58. In other words, s. 58 was the law at the time of the Request, and any change in that law would have required further primary legislation. In this sense, s. 58 is no different from any ordinary other provision in any other Act: it remains the law unless and until Parliament decides otherwise.

    b. Ms Hodge specifically did not commit to an ongoing review of s. 58. She committed to a review two years after s. 58 came into effect:

        "*I can give a clear commitment that two years after clause 56* [i.e. what became s. 58 of the Children Act 2004] *comes into effect we will review the practical consequences of those changes to the law, and will also seek parents' views about smacking. We will lay a copy of the results before Parliament.*"

        S. 58 came into effect on 15 January 2005, and thus the review was to begin at the start of 2007. This is borne out by the Review document itself. It states that the public consultation document was published in June 2007.

    c. Ms Hodge did not give any indication that a change in primary legislation was likely or even possible following the 2007 review. (the Review document did not suggest that the Government was contemplated amending s. 58.)

    d. Although statistics were collected by the CPS and others between 2005 and 2007 in relation to the use of the reasonable chastisement defence which could ultimately be relevant to a review, these were not collected specifically for the purposes of policy development but for operational usage by the CPS and others, such as responding to FOI requests.

64. We find that the Request in July 2005 was not made at a time of policy

"development" in any significant sense. This means that the need, if any, to withhold the Disputed Information so as to afford ministers and civil servants a "safe space" for their deliberations was much reduced. We agree with a differently constituted Tribunal's observation in the 1st *Scotland Office* case at §67:

> "The policy making process must reach a point where it can properly be regarded as having come to an end, although how that point is identified or categorised may vary. It seems to us that once an Act has received Royal Assent the policy has been enshrined in an Act of Parliament and that particular policy making period has come to an end. It is inevitable that many policy decisions, particularly if they are controversial or effecting a dramatic change, will be subject to further debates and perhaps development of a new policy to amend the existing one, but that does not mean that the policy itself is still being formulated or developed."

The public interest test

65. The next question we have to decide is where the public interest balance lies applying the test under s.2(2)(b), whether "in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". Put another way the Tribunal needs to decide whether, in relation to the documents / passages at issue, such public interest as exists in maintaining the exemption outweighs the public interest in disclosure. If the former does not outweigh the latter, then disclosure should be ordered.
66. The Tribunal notes a number of principles that have been established by the Higher Courts and differently constituted Tribunals which can help us with this question. Some have been annunciated in the previous section of this decision.
67. The mere fact that information falls within s. 35(1)(a) does not give rise to

any presumption that there is a public interest against disclosure.[7]

68. §75 of *DfES*" states that:

> (vii) In judging the likely consequences of disclosure on officials` future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote - Trevelyan reforms. These are highly – educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own."

Public interest in favour of maintaining the exemption

69. In addition to the "safe space" argument, the CPS contend that the following principal factors establish a strong public interest in maintaining the exemption:

a. the public interest in preserving frank and candid discussions surrounding the formulation or development of controversial policy;
b. the public interest in maintaining full records relating to the formulation or development of policy;
c. the public interest in safeguarding officials of any grade;
d. the public interest in the media not adversely affecting policy formulation and development; and
e. the principle of collective ministerial responsibility.

70. Mr Bates made much of the "chilling effect" arguments which were fully considered in *DfES*, and - to the strictly limited extent that they were found to have substance - they are reflected in §75 (iv) of that decision

[7] See *Office of Government Commerce v. Information Commissioner* [2009] 3 WLR 627 ("OGC"), *per* Stanley Burnton J, as he then was, at §79; *Scotland Office v. Information Commissioner*, 5 August 2008, EA/2007/0128 ("the 1st *Scotland Office* case"), at §55.

(see above) and by other Tribunals.[8]

71. Mr Bates argues that inter-departmental discussions in this case involving the Attorney General and/or the Director of Public Prosecutions are particularly sensitive, given the responsibilities that those office-holders have for certain matters that need to be addressed in a political impartial way. Also he argues that the potential embarrassment to government becomes an important public interest consideration where the effect would be to chill the quality of discussion within government in a way that would be detrimental to the quality of decision-making.

72. In addition Mr Bates argues that policy formulation discussions involving MPs, Peers and third parties have a particular chilling effect and that the public interest would be damaged in two ways:
    a. there would be a detriment to the quality and breadth of discussion of policy within government; and
    b. government would be less effective in formulating policies that would command a breadth of support from interested parties.

73. We have considered these arguments but do not consider that they require a change of approach in this case from that adopted by the Tribunal in *DfES* and which we have applied.

74. We find that in the circumstances of this case at the time of the Request that the so called chilling effects, if applicable, would be much reduced mainly because the need for a safe space was much reduced, because policy formulation and development had ceased at the relevant time.

75. In relation to the concern with media publicity we could understand the risk of premature publicity, say before November 2004, could have been a highly relevant factor, but of little weight in July 2005. Moreover Mr

[8] See also §71 of the 1st *Scotland Office* case: "We share the scepticism expressed by other Panels of this Tribunal as to the extent of the 'chilling' effects predicted in relation to the impact of disclosure in relation to internal governmental deliberations."

Sargent's evidence on this point seemed to us to be more about embarrassment as to some of the language used in the Disputed Information rather than a genuine concern about the media in this case.

76. The CPS also rely on the alleged risks in disclosing the Disputed Information now because changes to the legislation are being actively considered in 2010. The test in this appeal is whether, when it received the Request, the CPS dealt with it at that time in accordance the requirements of Part I of FOIA.[9] This is clear from the choice of tense in s. 50(1) FOIA: "whether...a request...has been dealt with in accordance with the requirements of Part I". Therefore we are limited as to what evidence we can take into account when considering the public interest test in this case.

77. Even if we could take into account the public interests arising in 2010 we are unconvinced by Mr Sargent's evidence that it would have a chilling effect on the way the current Bill progresses. In fact we find the reverse that the public interest in better understanding how government formulated and developed the 2004 policy would enhance the current debate.

78. The CPS make a number of criticisms of the IC's approach to the consideration of the public interest test. We consider these cannot be raised in this appeal because we do not have a judicial review role in relation to the IC's Decision Notice. If we consider, in the light of all the evidence and submissions that are put before us, that the public interest in maintaining the s. 35(1)(a) exemption for a particular information outweighs the public interest in disclosure then the Tribunal will allow the appeal in relation to that information, notwithstanding the view that the IC previously took.

79. As to collective ministerial responsibility Mr Bates accepts that disclosure

[9] See *e.g. DWP* at §30,

of the Disputed Information still in dispute is unlikely to threaten the convention. However he robustly pursues arguments as to why the convention is so important and that a negative impact in breaching the convention arises from the prospective anticipation of disclosure in other cases.

80. We find that FOIA requires us to consider all the circumstances of this case. There are only a few pieces of information to which the convention could be applied in this case. We find that none of these refer to any sharp disagreements or embarrassing options being put on the table. It would appear that none of these are going to make it harder for ministers to defend the Government line or is going to risk putting any sort of pressure on ministers to somehow go against the established convention of collective responsibility. Therefore, in all the circumstances of this case, we give limited weight to this public interest.

The public interest in favour of disclosure

81. As regards the general operation of the FOIA regime, Stanley Burton J in *OGC* expressed his agreement (at §71) with the following statement of the Tribunal at §29 of *DWP*:

> "It can be said...that there 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. What this means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis: section 2(2)(b) requires the balance to be considered 'in all the circumstances of the case'."

82. Further, as the Tribunal observed in the 1st *Scotland Office* case:

> "59. It is inevitable that the Commissioner will apply the same considerations in many cases but the effect of that is not to weaken their importance in any way. The factors for disclosure will almost always be wide, unlike those for maintaining the exemption. A differently constituted panel of this Tribunal stated in *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC* (EA/2006/0011 and 13):
>
> > 60. While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
> >
> > 60. There is, in our opinion, considerable public interest in disclosing information about decisions that have already been made. Such information is capable of, inter alia, encouraging participation in and debate about future decisions; informing people of which considerations were taken seriously, which were, and, may routinely be, ignored; the weight that is, or appears to be, given to particular factors; which 'tactics' are successful and which are not; revealing more about the role of the civil servant and the 'negotiations' that take place; and confirmation that the democratic process is working properly."

83. Further, in the present case, it is particularly relevant to note that there was considerable political and media interest in whether the law should permit smacking and that this interest continued well past the time of the Request.
84. In addition, as the Government itself noted in its 2007 Review, "*Much of*

the evidence gathered [in the Review] *suggests that there is a lack of understanding about the law*" [*§48*] "*In the view of many respondents* [to the public consultation on this issue]*, the legal position on physical punishment is not well understood by parents and those working with children and families...*".

85. Against this background, there is a particular public interest in disclosure of the Disputed Information as a means of informing the wider debate on the controversial issue of smacking and assisting the public to understand what is and is not legal in this regard. We regard this as a strong public interest.

86. Also in this case we find there is a strong public interest in knowing about the involvement of privileged lobbyists and how they are seeking to influence government.[10]

87. In addition we consider that there is a strong public interest in this case in understanding how government negotiates with the opposition and makes a decision to allow a free vote in Parliament.

The public interest balance

88. The Tribunal has considered the factors both in favour of maintaining the exemption and those in favour of disclosure as set above and given in evidence and submissions. By having allowed the ss.42 and 40(2) exemptions to be claimed and the subsequent agreement between the parties to allow the withholding of some of the Disputed Information and the disclosure of other information duly redacted our task of applying the public interest test to the balance of the Disputed Information is much reduced. This is the case because even for the remainder of the Disputed Information the CPS has accepted that some information in documents can be disclosed.

89. We are unable to provide in this open part of the decision the detailed

[10] See *DBERR v IC & Friends of the Earth* EA/2007/0072 29 April 2008.

analysis of the remaining Disputed Information. That is contained in the confidential annex to this decision.

90. However we have explained above our findings as to the weight we have given to factors which help determine the public interest for maintaining the exemption and for disclosure.

91. Generally we find that as the formulation and development of the policy on the reasonable chastisement defence had been established well before the time of the Request the need for a safe space for ministerial/civil servant/others deliberations had much reduced, if still needed at all. This meant that any chilling effect was much reduced and that the public interest in maintaining the exemption in this respect was no longer weighty. However the public interest in understanding how government reached its policy decision on such a controversial matter was very strong at the time of the Request.

Conclusion

92. We find that for the remaining Disputed Information the public interest balance favours disclosure of the information. In other words the public interest in maintaining the s.35(1)(a) exemption does not outweigh the public interest in disclosure. The detailed reasons are set out in the confidential annex.

93. In view of the parties having agreed how the rest of the Disputed Information should be dealt with we have allowed the appeal in part and provided a substituted decision notice to reflect what information can still be withheld and what should be disclosed.

94. The CPS is required to disclose the information which it cannot withhold within 30 days of date of this decision.

95. Our decision is unanimous.

Right to appeal

96. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this

decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.com

John Angel
Judge
FTT(IR)
24 March 2010