

Does the Freedom of Information Act Confer a Right to See Government Legal Advice?

By Jorren Knibbe¹

In its decision of 4 April 2006 in *Bellamy v Information Commissioner*, which has just been published on its website², the Information Tribunal has addressed issues arising under the Freedom of Information Act 2000 ("FOIA") which will be of great importance in particular to those giving legal advice to public bodies. The decision concerns the ability of a public authority to refuse to disclose information on the grounds that it is protected by legal professional privilege ("LPP"). The decision recognises that the LPP exemption is broad, but also that it may yield in certain circumstances to the public interest in disclosure.

Background

The appellant, Christopher Bellamy (as far as we know, no relation of the President of the Competition Appeal Tribunal!), operated a carpet-cleaning business as a franchisee. He formed the view that his franchisor had committed certain offences under Part XI of the Fair Trading Act 1973, and informed the Department of Trade and Industry ("DTI") accordingly.

In correspondence in 1999, the DTI took the view that the franchise arrangement was exempted from the 1973 Act by regulation 3(a) of the Trading Schemes (Exclusions) Regulations 1997 (SI 1997/31). This view apparently contradicted the DTI's own published guidance on trading schemes. When pressed, the DTI admitted that

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London WC1R 5NR

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

¹ Jorren is a pupil barrister with Monckton Chambers

² http://www.informationtribunal.gov.uk/our_decisions/documents/bellamy_v_information_commissioner1.pdf

"The Department has come to this view on the basis of the opinion of Treasury Counsel. I am sure that you would not expect the Department to disclose its legal advice to you."

In fact Mr Bellamy expected just that. The right to information under section 1 FOIA came into force on 1 January 2005. On the same day, Mr Bellamy issued a formal request under section 1 for sight of the instructions provided to Treasury Counsel and the opinion which he expressed.

In response, and subsequently in its internal review, the DTI relied on LPP as justifying its refusal to disclose the information which Mr Bellamy sought.

The Legislation

Section 1 of the FOIA confers a general right to information held by public authorities. That right may however not apply if the circumstances are covered by an 'exemption' under Part II of the Act. Where the applicable exemption is 'qualified' rather than 'absolute', the public authority will be entitled to refuse to disclose the information if the public interest in refusal outweighs the public interest in disclosure: section 2(2)(b).

One such 'qualified' exemption is the exemption under section 42 for information which is subject to legal professional privilege.

The proceedings under the Act

Mr Bellamy, who at that stage was not represented, applied in the first instance under section 50(1) FOIA for a determination of his complaint by the Information Commissioner. The Commissioner upheld the DTI's refusal to disclose the information on the grounds of LPP³, holding that the legal advice was privileged, and that the maintenance of the LPP exemption in the circumstances overrode the public interest in disclosure. The Commissioner did suggest to the DTI in a covering letter that it should consider writing to Mr Bellamy giving an explanation of its decision not to prosecute the franchisor. The DTI however refused to do so.

Mr Bellamy appealed against the decision of the Information Commissioner under section 57(1) to the Information Tribunal. The Tribunal upheld the Commissioner's decision, and dismissed Mr Bellamy's appeal.

Legal professional privilege and the public interest balance

Addressing the effect of the LPP exemption in section 42 FOIA, the Tribunal cited authority from the House of Lords to the effect that LPP is a "fundamental human right"⁴ and a "fundamental condition on which the administration of justice as a whole rests"⁵. It did not, however, endorse the view expressed in the Guidance on Procedures and Exemptions issued by the Department for Constitutional Affairs ("the DCA's Guidance")⁶, which informs Government departments that the public interest in maintaining the LPP exemption will only give way to the public interest in

³ Reference FS50066313; http://www.ico.gov.uk/documentUploads/New_Decision_Notice_66313.pdf

⁴ *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, 606H (per Lord Hoffmann); see the determination of the Information Tribunal at para. 11

⁵ *R v Derby Magistrates' Court, ex p. P* [1996] 1 AC 487, 507D (per Lord Taylor); see the determination of the Information Tribunal at para. 10

⁶ See <http://www.foi.gov.uk/guidance/index.htm>

disclosure in “exceptional circumstances”⁷. Instead, the Tribunal was “loathe to speculate [...] as to the varying circumstances in which the exemption might be disapplied”⁸. It held simply that

*“As can be seen from the citation of the legal authorities regarding legal professional privilege, there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. [...] It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case, of which this case is not one”*⁹.

The considerations which the Tribunal took into account in drawing the balance under section 2(2)(b) do however provide clues as to when a ‘clear case’ might be made out.

First, the Tribunal accepted that the public interest in maintaining LPP will be weaker where the issue is no longer “live”, or the legal advice has become “stale”¹⁰. This reflects a similar observation in the DCA’s Guidance at paragraph 4.20¹¹. Nevertheless, as Counsel for Mr Bellamy argued at the hearing, this is unlikely to be of much practical assistance to the complainant who requests information: his interest in obtaining the information is also likely to be weaker where the issue is no longer ‘live’. Thus it remains to be seen where the public interest balance would fall in such circumstances.

Secondly, the Tribunal held that it did not matter that the number of affected individuals in the present case was relatively small; it recognised that there may in any given case be a sufficient public interest in disclosure *“even though the actual number of individuals [who] are affected by an issue, may be numerically low”*¹².

It should be noted that the Tribunal did *not* say that the number of affected individuals is *irrelevant*. On the contrary, it seems that the Tribunal was concerned only to ensure that the public interest balance may be determined in the light of all the circumstances of each case. Of course it may be that a small number of complainants represents an important public interest; this will depend entirely on the facts of the individual case.

Thirdly, it seems that the availability of an alternative remedy may sometimes be taken into account in deciding whether to order the disclosure of information under FOIA. Counsel for Mr Bellamy argued that there was an important public interest in the present case in ensuring that the DTI properly exercised its role as regulator under the Fair Trading Act 1973¹³. At paragraph 36 of its Decision, the Tribunal held that

*“the fact that the DTI is a regulator is not of itself of particular note, since on the facts of this case at least Mr Bellamy has on his own admission always had the ability to pursue civil remedies but has chosen so far not to do so”*¹⁴.

The Tribunal thus held that Mr Bellamy could not rely on public interest arguments deriving from the DTI’s role as regulator, because he had not availed himself of remedies associated with the regulatory regime. It did *not* say that the failure to pursue an alternative remedy will itself weigh against disclosure. That would, it is submitted, be a step in the wrong direction. Under section

⁷ *Summaries of Exemptions*, Section 42, para. 4.15; <http://www.foi.gov.uk/guidance/exguide/sec42/chap04.htm>

⁸ Para. 12

⁹ Para. 35

¹⁰ Para. 35

¹¹ See above

¹² Para. 35

¹³ See the Decision of the Information Tribunal, para. 31

¹⁴ Mr Bellamy could have brought judicial review proceedings in respect of the failure by the DTI to enforce Part XI of the 1973 Act against the franchisor (see now Part 8 of the Enterprise Act 2002); he could also have brought a private action for breach of statutory duty under regulation 11 of the Trading Schemes Regulations 1997 (SI 1997/30).

2(2)(b) it is the public interest in release of the information which must be considered. The fact that an individual could have secured his own aims in another way ought to be irrelevant.

Access to the public authority's reasons

On appeal, Mr Bellamy limited his request to a summary of the "essential factual and legal basis"¹⁵ of the view expressed by Treasury Counsel and adopted by the DTI as the basis of its decision. The Tribunal held that limitation to be "artificial", since "*at all times the request ha[d] been to see the legal exchanges between Treasury Counsel and the public authority here in question*"¹⁶.

This suggests that a request under the FOIA for the reasoning behind a public body's decision will be subject to LPP in any case where that reasoning is based on legal advice. Yet if this argument is accepted, the ability of the complainant to obtain the reasons for the public authority's decision, at least in circumstances where there is no express obligation to give reasons, will be severely hampered, given the Tribunal's view that there is a strong general public interest in maintaining LPP. Wherever the public authority made a decision *on the basis of* legal advice, that fact alone would justify it in refusing to explain itself under the FOIA.

Inspection of the legal advice by the Tribunal

The present case will be of interest to practitioners because the Tribunal chose to view the legal advice in question¹⁷ despite the fact that none of the parties suggested that it would derive assistance from doing so. This seems to indicate that the Tribunal considers such viewings to be part of its general practice. If time is of the essence in an individual case, it may therefore be appropriate to press for consideration of the materials before the hearing, given that inspection of the materials after the main proceedings may lead to small delays in obtaining judgment.

Conclusions

The *Bellamy* case suggests that public bodies are likely to be able to protect their legal advice against FOIA requests while the matter remains live, although the Tribunal left the door open to requests for such advice in 'clear cases'. It also suggests that the FOIA may not be of great assistance in requiring public bodies to explain their reasoning where it is based on legal advice (although, of course, public bodies will often be obliged in any event to explain their legal reasoning). The case will therefore be welcomed by public bodies, but is unlikely to be the last word on the matter.

George Peretz represented Mr Bellamy before the Information Tribunal.

For more information on George Peretz, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on www.monckton.com.

¹⁵ Decision of the Information Tribunal, para. 26

¹⁶ Para. 36

¹⁷ In accordance with its Practice Direction, Part 1