IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No - EA/2014/0097

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50503882
Dated: 24 March 2014

Date Promulgated: 23 December 2015

Appellant:	**BINGHAM CENTRE FOR THE RULE OF LAW**
1st Respondent:	**INFORMATION COMMISSIONER**
2nd Respondent:	**THE HOME OFFICE**
Heard at:	**FIELD HOUSE, LONDON**
Date:	**27 NOVEMBER 2015**
Date of decision:	**9 DECEMBER 2015**

Before

ROBIN CALLENDER SMITH
Judge

and

GARETH JONES and DAVE SIVERS
Tribunal Members

Attendances:

For the Appellant: Mr Eric Metcalfe, Counsel instructed by the Bingham Centre for the Rule of Law, with Lord Lloyd of Berwick DL observing.
For the 1st Respondent: written representations from Mr Adam Sowerbutts, Solicitor for the Information Commissioner and Mr Tom Cross of Counsel (both documents provided for the original hearing of the appeal and for this hearing).
For the 2nd Respondent: Mr David Pievsky, Counsel instructed by the Government Legal Department.

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0097

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: FOIA 2000

Qualified exemptions

- Legal professional privilege s.42
- Formulation or development of government policy s.35 (1) (a)

Absolute exemptions

- Information supplied by, or relating to, bodies dealing with security matters s.23

Cases:

Bellamy v IC v Secretary of State for Trade and Industry EA/2005/0023.
Department for Education and Skills v IC v Evening Standard EA/2006/0006.
Pugh v IC v MOD EA/2007/0055.
Calland v IC v FSA EA/2007/0136.
Department for Business Enterprise and Regulatory Reform v O'Brien [2009] EWHC 164.
Szucs v IC EA/2011/0072.
Crawford v IC v Lincolnshire County Council EA/2011/0145.
All Party Parliamentary Group on Extraordinary Rendition v IC v MOD [2011] UKUT 153.
Department for Communities and Local Government v IC v WR [2012] UKUT 103.
Cabinet Office v IC v Aitchison [2013] UKUT 526.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 24 March 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Issues relating to the use of intercept evidence and intercepted material within the justice system in the UK – particularly in criminal trials – is a matter of high importance.

2. "Intercept material" is the conventional term for information derived from the covert interception of private communications such as a telephone

call, an email, text message or a private message sent via a social media platform such as *Facebook*.

3. Since 1985, the use of intercept material as evidence in criminal or civil proceedings has been prohibited in the UK.

4. Historically the two pieces of statutory legislation that prohibit this are section 9 of the Interception of Communications Act 1985 and, subsequently, under section 17 (1) (a) of the Regulation of Investigatory Powers Act 2000 (RIPA).

5. Of the 47 member states of the Council of Europe, the UK is the only country with the statutory prohibition against the use of intercept as evidence. Intercept evidence is also regularly used in criminal proceedings in other common law jurisdictions such as Australia, Canada, New Zealand and the United States.

6. The UK's statutory ban on the use of intercept as evidence has been repeatedly criticised by senior police officers, prosecutors, judges, NGOs and parliamentarians. In 2000, Lord Lloyd Berwick – a former Law Lord and the first independent reviewer of terrorism legislation – told Parliament:

> We have here a valuable source of evidence to convicted criminals. It is especially valuable for convicting terrorist offenders because in cases involving terrorist crime it is very difficult to get any other evidence which can be adduced in court, for reasons with which we are all familiar. We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted; we are the only country in the world to do so.[1]

7. In November 2001, the proposal to detain suspected foreign terrorists indefinitely without charge under what became Part 4 of the Anti-Terrorism Crime and Security Act 2001 was justified by one Home Office Minister in the following terms:

> If we could prosecute on the basis of the available evidence in open court, we would do so. There are circumstances in which we simply

[1] Hansard, HL Debates 19 June 2000, col 109 – 110).

cannot do that because we do not use intercept evidence in our courts.[2]

8. Since 2001, the difficulty of prosecuting terrorism offences has also been cited by successive governments as justification for a number of other exceptional anti-terrorism measures, including extended pre-charged detention, control orders and terrorism prevention and investigation measures (TPIMs).

9. In 2007, the Parliamentary Joint Committee on Human Rights referred to

> Steadily mounting evidence that the prohibition on the use of intercept as evidence is widely considered to be one of the principal obstacles to bringing more successful prosecutions of people suspected of involvement with terrorism.[3]

10. That Joint Committee concluded:

> We are satisfied that the evidence of the DPP and the former Attorney General puts the matter beyond doubt: that the ability to use intercept as evidence would be of enormous benefit in bringing prosecutions against terrorists in circumstances where prosecutions cannot currently be brought, and that the current prohibition is the single biggest obstacle to bringing more prosecutions terrorism. We recommend that this be taken as premise of forthcoming review by the Privy Council. The difficult question is not whether the current ban on the evidential use of intercept should be relaxed, but how to overcome the practical obstacles to such a relaxation.[4]

11. In the same month as the Joint Committee reported in 2007, the Prime Minister announced the establishment of a Privy Council Review

> To advise on whether a regime to allow the use of intercepted material in court can be devised that facilitates bringing cases to trial while meeting the overriding imperative to safeguard national security.
>
> It will consider:
>
> The benefits that might reasonably be expected to result from such use (in terms, for example, of increases in the number of successful prosecutions in serious organised crime and terrorism cases);
> The risks, including from exposure of interception capabilities and techniques;
> The resource implications of any changes in the law;
> The implications of new communications technology; and

[2] Lord Rooker, Hansard, HL Debates 27 November 2001, col 146.)
[3] *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL 157/HC 394, 16 July 2007 [107].
[4] Ibid [126].

The experiences of other countries and their relevance to the UK.[5]

12. Following the report to the Prime Minister and the Home Secretary by the Privy Council Review of *Intercept as Evidence*,[6] the Government then commissioned a programme of work to implement the recommendations of the Privy Council Review. The report had recommended, among other things, that "intercept as evidence should be introduced".[7] It also set out certain operational tests that would have to be met in order to meet the concerns of the Intelligence Services, among others.

13. The programme of work to implement these recommendations focused on model known as "Public Interest Immunity Plus". The implementation team was led by the Office for Security and Counter Terrorism in the Home Office and was carried out under the supervision of an Advisory Group of Privy Councillors.

14. That subsequent December 2009 report, *Intercept as Evidence,* set out the findings and conclusions of the programme of work.[8] In his Foreword to that report the Home Secretary, Alan Johnson MP, stated:

> ….These confirm the potential gains from a workable scheme for intercept as evidence and that, while requiring significant additional funding, the model developed would be broadly consistent with the operational requirements identified. *However, it is also the case that the model would not be legally viable, in terms of ensuring continued fairness at trial. The results would not only be potential miscarriages of justice and more expensive and complex trials but also more of the guilty walking free* [emphasis added].
>
> These findings are such that no responsible government could proceed with implementation on this basis. The Advisory Group concurs with this overall judgement. At the same time, both the Government and the Advisory Group believe that the potential gains from intercept as evidence justify further work, in order to establish whether the problems identified are capable of being resolved….
>
> The issues involved are complex and difficult, and addressing them commensurately challenging. But the importance of our interception

[5] 25 July 2007.
[6] Report, Cmd 7324, January 2008. The report's authors were Sir John Chilcot, Lord Archer of Sandwell, Alan Beith MP and Lord Hurd of Westwell.
[7] Ibid [204].
[8] Report, Cmd 7760, December 2009.

> capabilities to national security and public protection means that there can be no short cuts.[9]

15. The report stated that "the sensitivities involved mean that the full weight of supporting evidence cannot be made public".[10] It had, however, been made available to Ministers and to the Advisory Group of Privy Councillors.[11] This was said to include legal advice from independent Counsel.[12]

The request for information

16. It was against this background that the Bingham Centre for the Rule of Law (the Appellant) requested from the Home Office, on 13 November 2012, the following information:

> Please would you supply us with the following information: a copy of the independent legal advice referred to in the report *Intercept as Evidence* (Cm 7760 December 2009).

17. On 11 January 2013 the Home Office told the Appellant that the requested information was exempt from disclosure. The Home Office relied on the FOIA exemptions in section 24 (1) in relation to national security, section 31 (1) in relation to law enforcement, section 35 (1) in relation to the formulation government policy and section 42 (1) in respect of legal professional privilege. It also relied on section 23 FOIA to neither confirm nor deny whether it held information supplied by all relating to bodies dealing with security matters.

18. An internal review was requested by the Appellant on 10 March 2013. The Home Office responded on 18 June 2013 upholding its original analysis but clarifying that it was claiming that the section 42 (1) exemption applied to all of the withheld information.

[9] Ibid 4.
[10] Ibid 6.
[11] The Advisory Group comprised of Sir John Chilcot, Lord Archer of Sandwell, Sir Alan Beith MP and Michael Howard QC MP.
[12] Ibid 9.

The complaint to the Information Commissioner

19. The Appellant complained to the Commissioner on 18 June 2013. That complaint resulted in the Decision Notice of 24 March 2014.

20. That Decision Notice focused on the application of section 42 (1) in relation to the withheld information and did not consider any of the other exemptions claimed by the Home Office. It concluded that section 42 (1) was engaged and that the Public Interest Balancing Test (PBIT) favoured maintaining the exemption. The Decision Notice observed in particular the comments in *Bellamy*[13] that

> …. 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.

The appeal to the Tribunal

21. The Appellant submitted its appeal to the Tribunal on 22 April 2014.

22. In the Grounds of Appeal the Appellant conceded that section 42 (1) was engaged. It disputed that the PIBT favoured maintaining the exemption. In essence the Appellant considered that the Commissioner's analysis of the factors to be considered in evaluating PIBT was fundamentally flawed.

23. There was then and oral hearing with no live witnesses on 10 September 2014. The Home Office had not been joined as a party to those proceedings.

24. The decision that Tribunal reached on 19 September 2014 was appealed to the Upper Tribunal (AAC). The original Tribunal result was overturned

[13] *Bellamy v IC v Secretary of State for Trade and Industry* EA/2005/0023.

by Upper Tribunal Judge Wikeley.[14] He ordered a full oral rehearing before a new Tribunal.

25. It is that rehearing that is the subject of this decision.

Evidence

26. The Tribunal heard oral evidence from Ms Katy Hancock. She adopted her Open written witness statement dated 20 October 2015 and she was cross-examined on this by Counsel for the Appellant.

27. Her written witness statement had redactions and the Tribunal heard further evidence from her in closed session in relation the information that had been redacted as well and seeing the withheld information in its entirety.

28. In her Open evidence she explained that she had worked at the Home Office for six years and within interception policy for a period of over four months.

29. Before working on interception policy she had worked as a senior analyst at the Cabinet Office.

30. She was aware of only two other cases in relation to the government where a department had been ordered to disclose section 42 legal advice on public interest grounds and, in her view, neither of those cases bore any similarity to this matter.

31. She observed that the Home Office had not originally been joined to the appeal proceedings in September 2014 because it had been decided for cost reasons that it would rely on the submissions from the Commissioner.

[14] *Home Office v IC and Bingham Centre for Rule of Law* [2015] UKUT 0308 (AAC).

32. She believed the Home Office thinking had been based on observations similar to those made in *Cabinet Office v IC & Aitchison* where it had been observed that it was

> difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure.[15]

33. She stated that the legal advice in question had been commissioned by the Home Office Legal Advisers and policy officials on the understanding that it would be treated as legally privileged material.

34. In the *Intercept as Evidence* December 2009 report a short excerpt of the conclusions of the advice had been included. The decision to release a summary of the advice in the report had been taken because the Home Office felt that it was sensible reasonable approach that allowed the public to have some insight into the process while maintaining the confidentiality of the substance and detail of the advice itself.

35. Providing a summary or gist of the advice allowed the public to understand the basis for the government's position, while at the same time protecting the details that required protection. The public interest, she believed, had been met by the publication of the report which identified the varying legal models for the use of intercept material as evidence and comments on the conclusions presented by the independent legal advice.

36. She maintained that the Home Office had a legitimate expectation of confidentiality in the legal advice it had sought. The government and its officials had a mandate – as well as the responsibility – to formulate, develop and put forward for consideration appropriate policies that advanced the national interest.

37. The public expected decisions taken by government to be taken on the basis of good quality legal advice and that in itself was an aspect of the public interest. That was particularly compelling in the area of law enforcement and counter terrorism. The issues were complicated, fast-

[15] *Cabinet Office v IC & Aitchison* [2013] UKUT 26 (AAC).

moving and often sensitive. Government departments needed high-quality comprehensive legal advice for the effective conduct of its day-to-day business. The advice needed to be given in a timely fashion to ensure the policy developed in a fully informed way. Legal advisors needed to be able to present the full picture to their clients including not only arguments in support of their conclusions but also the potential counter-arguments, in order to assess the merits of each.

38. Legal advice obtained by government departments often set out – within its reasoning – the perceived weaknesses of the department's position, or counter-arguments that might be made. That material helped provide the government with comprehensive legal advice. Without such comprehensive advice, the quality of the government's decision-making would be "much reduced because it would not be fully informed".

39. Revealing the perceived weaknesses and counter-arguments would provide a clear path the disaffected parties to mount case. That would be contrary to the public interest and was an important consideration in the issues under review in the appeal. It could also create a situation of unfairness since other parties to litigation would not be forced to reveal what legal advice they had received.

40. Disclosure of legal advice would prejudice the government's ability to defend its legal interests because it would mean unfairly exposing its legal position to challenge thus diminishing the reliance it could place on the advice being fully considered and presented without fear or favour. Neither of those outcomes was in the public interest. The former could result in serious consequential loss – or at least in a waste of resources in defending unnecessary challenges – and the latter could result in poorer decision-making.

41. There was also a risk that lawyers and clients would avoid making a permanent record of the advice given, or make any partial record. It was in the public interest that the provision of legal advice was fully recorded in

writing. As policy developed or litigation decisions were made it would be important to be able to refer back to advice given along the way. It was in the public interest that the record described the process of decision-making accurately and fully and the legal advice should be part of that record. A worst-case scenario would be a reluctance to seek advice at all and that could lead to decisions being made that would legally flawed.

42. In this case, if the legal advice in question was disclosed in its entirety it would provide – in essence – a road map for future challenges should the government in future decide to amend the framework. The advice set out in great detail the challenges of any changes to the system. Should those be made public it would inhibit the government from future revisions to the policy on the basis that potential weaknesses had already been spelt out in detail putting the government at a decisive disadvantage in the inevitable litigation that would follow. That would not be in the public interest and – in this case – it was imperative that the legal advice was protected in order to ensure future policy development on the topic was conducted thoroughly, and that officials did not feel that they had to shy away from being as open and transparent as they could be. She believed the approach taken in this particular case struck the correct balance by being as open and transparent as possible.

43. In relation to the Security Services exemption (section 23) she stated it was possible to argue that the entirety of the disputed information might be considered exempt under section 23 (1) – on the grounds that it broadly related to the work of bodies listed at section 23 (3) – but the Home Office was relying only on that exemption only insofar as it made explicit references to capabilities or challenges faced by section 23 bodies.

44. The public association between interception and the security intelligence agencies (SIA) had been the reason behind the Home Office decision to set aside its reliance on the “neither confirm nor deny” provision in section 23 (5).

45. She added that the issue of intercept evidence was “live” and was likely to remain so. The public interest in revealing the advice was limited in that it was already known that the advice set out the difficulties in reform.

46. She stated (in Paragraphs 28 – 30) of her open witness statement:

> The disputed information provides advice on how different options might function. It serves to provide officials with the basis on which to take forward policy formulation, enabling informed discussion and decision-making. As with any area of life policy, what is considered one point may be revised or set aside for use at a later point. In this respect the disputed information has enduring relevance to the policy formulation.
>
> Intercept as evidence is a sensitive issue, with a great deal of public speculation on whether or and how the government might wish to adapt the legal system to accommodate material obtained through interception. More so than many other areas of current government policy there is pressure from both groups and individuals to shape the debate around this issue and in a manner that supports their own particular narrative; the intention being to exert pressure on the policy process in order to promote a particular political or ideological considerations.
>
> In the face of pressure to introduce interceptors evidence in order to increase the number of successful prosecutions in serious crime and national security cases, eight reviews have been undertaken since 1993. The most recent review published its findings in 2014. The 2014 review went further than any previous review by considering the costs and benefits of an intercept as evidence regime, even if that meant considerable operational upheaval for the intercepting agencies. The review found that the substantial costs (between £4.25 billion and £9.25 billion over 20 years) outweighed the uncertain benefits. But the very fact that such a detailed review was published in 2014 (some two years after the date of the request) indicates that, at the time of the request in this case, the issue was very much a “live” one. I do not therefore think that it would be correct to characterise intercept evidence as “not live” in that way and in this context, as has been suggested.

47. Then, at the conclusion of Ms Hancock’s closed oral evidence, Mr Pievsky as Counsel for the Home Office, summarised what had been dealt with in the following way in open court:

> During the Closed Session Ms Hancock
>
> (a) referred to the information in dispute in order to clarify who commissioned and made use of the legal advice;

(b) confirmed her written Closed evidence as to the paragraphs in the legal advice to which section 23 applied; and

(c) confirmed her written Closed evidence that the party political detriments of disclosure were not her main concern in relation to special detriment. She added that harm could be caused by disclosure if a few defendants in criminal trials knew the content of the legal advice.

Conclusion and remedy

48. The structure of the Tribunal's reasons and conclusions in respect of this appeal follow the three areas of the FOIA exemptions relied on by the Home Office (and which are set out in the Appellant's skeleton argument). These are section 42 (Legal Professional Privilege), section 35 (formulation of government policy, etc) and section 23 (Information supplied by, or relating to, bodies dealing with security matters).

49. Before dealing with that, however, the Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.

50. In *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

51. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

    i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

    ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

    iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

    iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

    v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

52. The closed bundle in this appeal contained the disputed information and the unredacted witness statement from Ms Hancock.

53. It was necessary for the Tribunal to see the disputed information – and consider the totality of it – in relation to the exemptions claimed.

54. The Tribunal has considered carefully and rigorously the Appellant's points and concerns already expressed in the notice of appeal and in its other representations and submissions.

55. As a result of its conclusions and reasons the Tribunal's decision is an open one with no closed, confidential annex.

56. The Tribunal does not propose to elaborate further on the information in the unredacted witness statement or – as a result of its decision generally – to give any further detail of the withheld information save that which was

in the open material. It is not possible to do so in any realistic or proportionate sense without defeating the object of maintaining the elements of the legal professional privilege.

Section 42: Legal Professional Privilege

LPP did not belong to the Home Office.

57. The Appellant challenged whether the advice in question was obtained for the Home Office for its own use but accepted that the section 42 (1) exemption was engaged on the basis that the information requested was independent legal advice and therefore covered by legal advice privilege.

58. The Tribunal does not consider that this was the Appellant's strongest point either as a matter of law or fact. Having heard the evidence from Ms Hancock and considered the detailed cross-examination of her on this point the Tribunal is satisfied that it was the Home Office who procured the legal advice in question for the benefit of the Privy Council Advisory group and that – in so far as matters need to be stretched – the benefit of the Legal Professional Privilege attaches equally to the Home Office, as commissioners of the advice by and for the Privy Council.

59. The Tribunal has had the benefit of seeing and considering the written and oral evidence provided by Ms Hancock – both as open and closed material – and has also observed her evidence tested under cross examination by experienced Counsel for the Appellant.

60. The evidence she provided throughout was clear, cogent and credible. For that reason, the Tribunal accepts and attaches significant weight to the veracity of her open witness statement at Paragraph 7:

> The legal advice in question was commissioned by Home Office Legal Advisers and policy officials on the understanding that, as with all legal advice the Home Office commissions, it would be treated as legally privileged material.

Interests ordinarily underpinning LLP absent because of the cross-party nature of the issue.

61. To the Tribunal, this seemed a strained argument by the Appellant. Why it should lose the protection of LPP simply because – having been commissioned by the Home Office – it was being used in a cross-party sense by this Privy Council Advisory group was not clear.

62. Looking at which interests were served by the relevant legally privileged advice it seems clear to the Tribunal that this was part of an exercise where the Government needed advice – via the Privy Council Advisory group as commissioned by the Home Office – on the law and that needed that to be confidential and professional. It is hard to imagine more compelling public interest considerations operating behind such legal advice. It is legal professional advice as cogent and relevant in respect of when it was prepared and presented as it has remained with the passage of time.

Disclosure of the legal advice involves no realistic possibility of prejudice to the government's interests.

63. As stated above, the Tribunal believes it would be hard to find a more concrete example in the totality of the advice provided of something that would almost certainly prejudice the government's interests whether at the time of the original request, now or looking forward to the future.

64. The Appellant accepts that the core justification for protecting LPP is the common law right of access to the courts and maintaining respect for the rule of law. It is settled law that that principle is necessarily subject to limitation in those circumstances where protecting LPP would otherwise undermine fundamental rights or the rule of law.

65. While Parliament, in enacting section 42 FOIA, made it a qualified rather than an absolute exemption that necessarily demonstrated that Parliament did indeed contemplate a range of potential circumstances in which the

public interest in maintaining LPP would give way to the public interest in the disclosure of legal advice. The memorable comment in relation to this is that that "*Section 42 is not to be elevated 'by the back-door' to an absolute exemption*".[16]

66. However, considering Ms Hancock's open evidence – without even praying in aid matters seen and considered in full in the withheld information – the following public interest factors she identified properly create an overwhelming weight on the nondisclosure side of the balance. These are (précised from her witness statement):

(1) In the *Intercept as Evidence* December 2009 report a short excerpt of the conclusions of the advice had been included. This allowed the public to have some insight into the process while maintaining the confidentiality of the substance and detail of the advice itself.

(2) Providing a summary or gist of the advice allowed the public to understand the basis for the government's position, while at the same time protecting the details that required protection.

(3) Publication of the report identified the varying legal models for the use of intercept material as evidence and comments on the conclusions presented by the independent legal advice.

(4) The government and its officials had a mandate – as well as the responsibility – to formulate, develop and put forward for consideration appropriate policies that advanced the national interest.

(5) In the area of law enforcement and counter terrorism the issues were complicated, fast-moving and often sensitive. Government departments needed high-quality comprehensive legal advice for the effective conduct of day-to-day business. The advice needed to be given in a timely fashion to ensure the policy developed in a fully informed way. Legal advisors needed to be able to present the full picture to their clients including not only arguments in support of their conclusions but also the potential counter-arguments, in order to assess the merits of each.

(6) Legal advice obtained by government departments often set out – within its reasoning – the perceived weaknesses of the department's position, or counter-arguments that might be made. That material helped provide the government with comprehensive legal advice. Without such comprehensive advice, the quality of the government's decision-making would be "much reduced because it would not be fully informed".

[16] *DBERR v O'Brien* [2009] EWHC 164 (QB): Wyn Williams J [41].

(7) Revealing the perceived weaknesses and counter-arguments would provide a clear path the disaffected parties to mount case. It could also create a situation of unfairness since other parties to litigation would not be forced to reveal what legal advice they had received.

(8) Disclosure of legal advice would prejudice the government's ability to defend its legal interests because it would mean unfairly exposing its legal position to challenge thus diminishing the reliance it could place on the advice being fully considered and presented without fear or favour. The former could result in serious consequential loss – or at least in a waste of resources in defending unnecessary challenges – and the latter could result in poorer decision-making.

(9) There was also a risk that lawyers and clients would avoid making a permanent record of the advice given, or make any partial record. It was in the public interest that the provision of legal advice was fully recorded in writing. As policy developed or litigation decisions were made it would be important to be able to refer back to advice given along the way.

(10) In this case, if the legal advice in question was disclosed in its entirety it would provide – in essence – a road map for future challenges should the government in future decide to amend the framework. The advice set out in great detail the challenges of any changes to the system.

The "live" nature of the legal advice is a factor favouring disclosure in the present case.

67. For reasons already explained the Tribunal believes exactly the opposite applies to the withheld information.

Disclosure of the legal advice would strengthen the government's own development of its policy.

68. The Tribunal believes that, on the facts and given the nature of the withheld information in this appeal, just the opposite would obtain if the legal advice was disclosed.

Disclosure of the legal advice would assist the administration of justice.

69. It is the Tribunal's finding that disclosure of this legal advice – far from assisting in the administration of justice – would have a deleterious effect on it for reasons already explained.

70. In essence, it could provide a “road map” for future challenges should the government at another time decide to amend the framework in this delicate and sensitive area.

Disclosure of the summary is not sufficient.

71. There are good reasons relating to the public interest balance why the summary is so carefully cast and why the legal advice lying behind that summary – despite being very detailed – is not elaborated on further.

Section 35 (Formulation of government policy, etc) and Section 23 (Information supplied by, or relating to, bodies dealing with security matters).

72. The Tribunal has considered these exemptions. It regards them as ancillary and subsumed by its main finding.

73. That main finding that the Home Office has properly relied on section 42 FOIA, that it is fully engaged and that – when the public interest balancing test is considered and concluded in terms of the fact that it is a qualified exemption – the balance falls squarely and unequivocally in withholding the information and maintaining the legal professional privilege exemption as originally claimed.

74. Our decision is unanimous.

75. There is no order as to costs.

Robin Callender Smith

Judge

9 December 2015