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Freedom of Information Update

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Lawyers who act as external legal advisers to large public authorities will inevitably hold a lot of documents about the subject of their instructions. Consequently when their clients receive Freedom of Information Act requests some of these documents may be caught by the Act as being information "held by another person on behalf of the authority" (section 3(2)(b)). A recent Information Tribunal decision sheds more light on this issue.

In Mrs. B Francis v Information Commissioner and South Essex Partnership Foundation NHS Trust (21 July 2008), the request concerned information about the death of the appellant's son and the care he received from the Trust. A lot of information was held by solicitors acting on behalf of the Trust during various inquires into the death. The Trust argued that most of the information was not held on its behalf, but belonged to the solicitors, and so was outside the scope of the Act.

The Tribunal ruled that, in respect of each set of files held by the various solicitors for the Trust, it had to consider whether the papers were owned by the Trust, as client, or whether they were owned by the solicitors. If it was the former, the papers were held on behalf of the Trust and would be disclosable unless an exemption applied. If it was the latter, the papers were held by a private entity outside the scope of the Act, and would not be disclosable.

The Tribunal considered the various legal authorities on the ownership of solicitors' files as well the Law Society's Guide to the Professional Conduct of Solicitors. It decided that the client is the owner of all documents that were created or received by the solicitor whilst acting as the client's agent. Such documents will include all transactional documents (and drafts thereof), correspondence passing between the solicitor and third parties and attendance notes of conversations between the solicitor and third parties whilst acting as the client's solicitor and agent. The solicitor's working papers belong to the solicitor. Such papers include correspondence to and from the client, attendance notes of discussions with the client and drafts of letters and notes of other research.

With regard to photocopies of documents, the Tribunal agreed with the Law Society guidance, that copies made for the client's benefit, of letters received by the solicitor, belong to the client; whereas copies of the same letters, made for the benefit or protection of the solicitor, where the cost of copying is not regarded as an item chargeable against the client, belong to the solicitor. A file may contain a clean (or original) copy, and a photocopy bearing the solicitor's annotations. The former may well belong to the client, the latter may well be a working paper belonging to the solicitor.

The Tribunal then went onto consider whether the information held by the Trust's solicitors was covered by legal professional privilege and so exempt under section 42 of the Act. It applied the

test in Mersey Tunnel Users Association v Information Commissioner and Merseytravel (15 February 2008) where a differently constituted Tribunal ruled, for the first time, that legal advice should be disclosed on public interest grounds despite it being covered by legal professional privilege. In the Francis case the Tribunal decided that the balance was firmly in favour of maintaining the exemption. It compared the facts with those in Mersey Tunnel. It noted that there, the advice was a one off, though it had effects which were still continuing. Here the advice extended over a period of time, and is still current: police enquiries, for example, have relatively recently been reopened. In Mersey Tunnel the issues involved were matters of pure public administration: the tribunal in that case observed that in such circumstances "there is less inbuilt weight attaching to the exemption" (paragraph 50). Here, significant personal interests were involved – literally, matters of life and death. In the Tribunal's view this is a case "at the opposite end of the spectrum of importance", much closer to the examples discussed in Mersey Tunnel, of "legal advice in a criminal or child care case", (paragraph 49).

The Tribunal accepted that the appellant had a great personal interest in information relating to the circumstances in which her son died, but that was not the same as the public interest in those circumstances, which had been largely satisfied. This is an important ruling for lawyers and will serve to remind them that FOI's reach will extend to client documents held on their behalf.

In August the Commissioner ruled on an appeal involving the Foreign and Commonwealth Office (06/08/2008 Ref: FS50179353) where the complainant requested the names and job titles of the UK and Russian diplomats who were expelled as a result of the diplomatic dispute that followed the murder of Alexander Litvinenko in London in 2006. The FCO refused to disclose the information relying on the exemption in section 40. The Commissioner found that the requested information constituted personal data and its disclosure would breach the first Data Protection Principle which requires that personal data be processed fairly and lawfully.

He ruled that, given the circumstances, it would be reasonable for the expelled diplomats to assume that their identities would not be revealed to those without an operational need to know. This is especially true given what the FCO described as the "long standing diplomatic custom", of which the diplomats would no doubt be aware, that the identities of expelled diplomats are not disclosed, thus adding to the expectation of anonymity.

The Commissioner also felt that given that the diplomats involved were expelled as a result of a situation over which it appeared they had no control, they should be protected as far as possible from any adverse consequences. It would not be unreasonable to suppose that their careers, given the sensitivity of their roles, could be disadvantaged in some way were their identities to be revealed.

It is now common practice for complainants not just to request details of contracts and successful bids but unsuccessful ones too. In Department for Transport (28/07/2008 Ref: FS50141374) the complainant requested the Net Present Value ("NPV") figures offered by the unsuccessful bidders for the South Western rail franchise. The DfT confirmed that it held this information, but refused to disclose it, relying on the exemption under section 43(2); that disclosure would harm the commercial interests of the bidders as well as the DfT itself.

The Commissioner was not persuaded by this argument. He believed that the bidding process for a rail franchise, and the process of awarding the franchise to a particular bidder, is a complex one with many variables, including the needs and priorities of the bidding companies at the time the bids are made. He did not believe that conclusions could be drawn solely from the NPVs alone. He was also not persuaded that the withheld information would allow competitors of the bidders to take a more informed view of their future bidding behaviour nor that the disclosure of the withheld information will be likely to lead to more conservative bids in future rail franchise competitions and thus harm the DfT.

This decision proves that it is not enough to show that information is commercial in nature to claim the section 43 exemption. There must be a significant prejudice to one or more of the parties' commercial interests and a clear causal link between disclosure of the information and the prejudicial effect.

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