DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EA/2017/0232, made on 1 May 2018, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. I begin by apologising that I have taken longer to write this decision than I predicted at the close of the oral hearing. It is public knowledge that the work of courts and tribunals has been disrupted recently by widespread IT problems. The progress of this case has suffered as a result.

A. How one thing can lead to another

2. This case is a classic example of how one thing can lead to another. It began with a visit by Mr O'Hanlon and a friend to see a neighbour who was terminally ill in hospital. There was a disagreement with the nurses whether or not to call a doctor. This has led to the following:

- A complaint to the NHS Trust responsible for the hospital.
- A further complaint to the Trust about the handling of the first complaint.
- A complaint to the Ombudsman about the way the Trust had dealt with the complaints.
- A request to the Trust under the Freedom of Information Act 2000 (FOIA from now on). This came before the Information Commissioner on complaint, and then before the First-tier Tribunal on appeal, which was disposed of by consent.
- A further request to the Trust under FOIA. This came before the Commissioner on complaint (FS50552668) and then before the First-tier Tribunal on appeal (EA/2015/0120). I am going to call this 'the 2015 appeal.' Upper Tribunal Judge Markus refused Mr O'Hanlon permission to appeal against the tribunal's decision (*GIA/2145/2016*).
- A request to the Commissioner as a public authority under FOIA. Following the Commissioner's reply, the matter came before the Commissioner on complaint (FS50676914) and then before the First-tier Tribunal on appeal (EA/2017/0232). This case is an appeal, brought with my permission, against the tribunal's decision.

B. What Mr O'Hanlon's asked the Information Commissioner for

3. Mr O'Hanlon made his request to the Commissioner as a result of a statement made by counsel for the Commissioner in the 2015 appeal. It related to paragraph 13 of the Commissioner's guidance on **Prejudice to the effective conduct of public affairs (section 36)**. This is what counsel wrote: 'the Commissioner intends to revise this paragraph of the Guidance so that the intended meaning is clear.' The paragraph deals with the choice of qualified person under section 36 and delegation of that person's function. Mr O'Hanlon doubted whether counsel's statement had been correct. Hence his request to the Commissioner. It was long and detailed, but the gist of it was that Mr O'Hanlon asked for proof that there had been 'any decision amounting to a settled intention to make any such revision' to the guidance. He told me that he hoped the Commissioner would deny holding such information, which would be an admission that no decision had been made to change the guidance.

C. The Commissioner's response

4. As it happens, the Commissioner did not deny holding information. Some information was provided and the remainder was withheld, relying on section 42 of FOIA:

> **42 Legal professional privilege.**
>
> (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
>
> (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

If this section is engaged, disclosure is subject to the balance of public interests under section 2(2)(b).

D. Mr O'Hanlon made a complaint to the Commissioner and appealed to the First-tier Tribunal

5. Mr O'Hanlon then challenged the Commissioner's response under section 50 of FOIA, but the Commissioner decided that the request had been dealt with in accordance with Part I of the Act. This led to an appeal to the First-tier Tribunal.

E. Mr O'Hanlon was partly successful on his appeal

6. The First-tier Tribunal decided that the Commissioner was under a duty to disclose further information. That part of the decision has been complied with and there is no need to mention it further. Otherwise, the tribunal confirmed that the information was subject to legal privilege and that the balance of public interests was in favour of non-disclosure.

7. For the law on legal privilege, the tribunal relied on the judgment of Andrews J in *Director the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB). The Court of Appeal allowed in part an appeal against that decision, but did not disagree with the judge's analysis of the law: [2018] EWCA Civ 2006.

8. The tribunal decided that the Commissioner did hold information covered by the request. It referred to documents in the closed material before it and 'can state unequivocally that they do recognise that the guidance would have to be revised, if only for clarification.' It went on to find that 'The documents clearly contain legal advice communicated by lawyers to their clients. Legal advice privilege therefore *prima facie* applies. However, the Tribunal must consider authorisation and waiver.' Having done so, it decided that (a) the person giving the instructions and receiving the advice had been authorised to do so and (b) the privilege had not been waived.

9. This left the tribunal to apply the balance of public interests test. It recognised the public interest inherent in the law of privilege, but noted that this was subject to the possibility of disclosure if that is what the balance of interests required. It took into account that the advice was recent and current at the time of the request, and that it did not relate to or affect any individual's private or public law rights. It rejected as irrelevant the argument that disclosure could undermine the public confidence in the Commissioner. Mr O'Hanlon's reliance on dishonesty or fraud fell away with the finding that counsel's statement in the 2015 appeal had been correct.

10. One public interest point was of particular significance to Mr O'Hanlon. This was his argument that the Commissioner's conduct in the 2015 appeal was a factor that justified disclosure. I need to explain this. Mr O'Hanlon had asked the Trust for information. The Trust relied on the opinion of a qualified person under section 36 of FOIA. There was doubt whether the person who gave the opinion was entitled to act in that capacity. The Commissioner suggested that the Trust should obtain a further opinion. In the end, two were provided. The tribunal said that 'Mr O'Hanlon is right to be concerned about the Commissioner's apparent intervention. … It follows that, to put it at its lowest, [the Commissioner's] intervention might have been crucial in turning a victory for Mr O'Hanlon on the section 36 issue into a defeat.' This intervention led him to believe that the Commissioner was diverting attention from inaccurate guidance by adopting a 'win at all costs' approach. The tribunal decided that 'the Commissioner's conduct in this respect should not tip the public interest scales.' There was no link between the suggestion for a second qualified person's opinion and the discussion about amending the guidance. Those discussions would have taken place anyway. The Commissioner did not rely on the guidance in the 2015 appeal and the decision to change the guidance 'was only of marginal relevance to that appeal,' as Mr O'Hanlon acknowledged.

F. Mr O'Hanlon appealed to the Upper Tribunal

11. I gave Mr O'Hanlon permission to appeal to the Upper Tribunal. His grounds of appeal, like his submissions on the appeal, were long and detailed. That was one of the reasons why I directed an oral hearing. It took place before me on 14 January 2019. Mr O'Hanlon appeared and spoke for himself. Zoe Gannon of counsel appeared for the Information Commissioner. I am grateful to them both for their submissions. I am particularly grateful to Mr O'Hanlon for the way that he distilled his grounds and will deal with the points as he presented them to me.

Preliminary points

12. Before I do that, I want to make two points. First this is not an appeal against the decision on the 2015 appeal. This tribunal has already refused permission to appeal against that decision. It is not my role to go behind that. Nothing I say in this decision should be interpreted as doing so. Second, Mr O'Hanlon's approach involved seeing proceedings in terms of pleadings, no doubt reflecting his former career as a local authority solicitor involved in commercial litigation and arbitration. Just to give a couple of examples, he said that the Commissioner had made a general traverse, which was not allowed under modern case management, and had not made a positive challenge to his allegations of misconduct. That is not an appropriate perspective in proceedings before the General Regulatory Chamber of the First-tier Tribunal and the Administrative Appeals Chamber of the Upper Tribunal. It distorts the proper understanding of what parties say and what their responses signify.

The Information Commissioner held information

13. I now come to Mr O'Hanlon's grounds. He argued that the tribunal had not made a finding on the issue whether the Commissioner had made a decision amounting to a settled intention to revise the guidance. I reject that argument. I have quoted what the tribunal said in paragraph 8. It might be criticised for finding that the guidance would have to be revised rather than that it would actually be revised. But that would be pedantic. Read fairly and in its context, the tribunal made a finding that a decision had been made in the terms of Mr O'Hanlon's request. The tribunal was aware of what Mr O'Hanlon wanted to know and said so plainly in the same paragraph as it made its finding. The tribunal made a finding of fact based on the closed evidence before the tribunal. There is no error of law in that finding.

The balance of public interests favoured withholding the information

14. Mr O'Hanlon also argued that the Commissioner's conduct in the 2015 appeal either prevented the Commissioner from relying on legal advice privilege or should mean that the public interests balance was in his favour. He said that the Commissioner's approach amounted to a personal attack on him and that he was being accused of being dishonest. The tribunal made its view clear on what the Commissioner had done; it was less than approving. I might have been more

generous to the Commissioner. I can see the sense in saying to a public authority that its approach had been defective, but it would be more efficient to remedy it while the case was before the Commissioner. That would avoid the need for the Commissioner to remit the case to the public authority, only for it to come back to the Commissioner when the proper approach had been followed. Be that as it may, I will deal with the case on the basis of the tribunal's view, which was favourable to Mr O'Hanlon. On that basis, I can see no error of law in the tribunal's approach, either as regards privilege or the balance of public interests.

15. Section 2(1)(b) says 'outweighs', which inevitably leads to talk of balance, as I did in paragraph 4, and scales, as the tribunal did. These metaphors may be difficult to avoid, not least because they have a statutory basis, but they conceal the analysis that section 2(1)(b) requires. The first step is to identify the values, policies and so on that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, it may involve a judgment between the competing interests. In other cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it did. This explanation should not be difficult if the tribunal has undertaken the analysis in the first two steps properly. It may even be self-evident.

16. In substance, the tribunal undertook the analysis I have set out. I will concentrate on the point that Mr O'Hanlon made. The Commissioner's behaviour, as interpreted by the tribunal, was one factor that had to be taken into account. It was relevant to the extent that it undermined the values and policies on which legal advice privilege is based or enhanced the values and policies on the other side. But it was not the only factor. The tribunal had to take account of all the relevant factors and give this one its proper significance. Accepting the tribunal's criticism of the Commissioner's conduct, and accepting Mr O'Hanlon's feelings about what happened, the tribunal was right that they were not decisive or even a significant factor in any decision that the tribunal had to make. The issue for the tribunal was whether the information relating to the decision to revise the Commissioner's guidance should be disclosed. The Commissioner's conduct was a background against which that decision was made. At most, it exposed the possible need for a revision. It did not dictate that there should be one or what that form it should take. The tribunal gave this factor its proper significance. It took appropriate account of other relevant factors. It explained what it did and why it did it. Its reasoning was rational and cogent. There was no error of law in the tribunal's approach.

G. The Commissioner shouldn't worry about immaterial mistakes by the First-tier Tribunal

17. Ms Gannon asked me to deal with a mistake the tribunal had made about the law of privilege. That mistake was to Mr O'Hanlon's benefit and did not affect the outcome of the appeal. So why should the Commissioner worry? The answer is that the Commissioners have made rods for their own backs by treating

statements of law by the First-tier Tribunal as significant. The correct approach is to treat the decisions of the First-tier Tribunal with the respect they are due, no less but no more. What is their due? (a) A decision of that tribunal is, subject to any appeal, binding as between the parties on the issues decided. The Commissioner is under a duty to accept it as such and does. (b) I know from the documents in this case that the Commissioner analyses each case to see what lessons can be learned for the future. That is a proper and valuable practice. (c) The problem comes when the Commissioner treats the First-tier Tribunal's decisions as containing authoritative statements of the law. They do not. Anything that the tribunal says in one case is not binding in any other. If it is wrong, it must not be followed in other cases. If it happens to be right, all to the good, and the same law should be applied in later cases. But it should be applied only because it is the law, not because it was said by the tribunal in a previous case.

18. It may be unrealistic to expect the Commissioner to change her practice, at least immediately, so I will do as Ms Gannon asked. But the Commissioner must not rely on such generosity of spirit in the future. To adapt the phrase used by the presiding tribunal judge in this case, it is not the Upper Tribunal's role to mark the First-tier Tribunal's homework.

19. The Commissioner is concerned about the tribunal's statement that 'Legal advice privilege presupposes a disparity in relevant expertise between the maker of a communication and the receiver which the communication is designed to address, so that the receiver is equipped to make appropriate decisions.'

20. I accept Ms Gannon's argument. There is no authority to support the tribunal's proposition and it is inconsistent with the fact that lawyers can rely on legal advice privilege. There is also a practical consideration: how is it possible to know whether there is the disparity of expertise and whether it was relevant? One lawyer may ask another for advice for a number of reasons. Just by way of example, a lawyer may get advice: (a) to obtain an opinion from someone who is more knowledgeable or more experienced; (b) to get a second opinion; (c) to protect themselves from liability; (d) to obtain advice on tactics. There may be disparity in (a), but not necessarily in the others. There may be clear cases in which a disparity is obvious, but not always. The law of privilege does not depend on having to evaluate the comparative knowledge of the lawyers involved or to interrogate the motives of the person asking for the advice.

Signed on original
on 29 January 2019

Edward Jacobs
Upper Tribunal Judge