DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

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

The decisions of the First-tier Tribunal under references EA/2015/0034, 0074 and 0098, made on 15 October 2015 after a hearing at Bristol, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. The requests for information

1. Dr Kirkhope is interested in the way that legislation exempts the Duchy of Cornwall from criminal liability. In June 2014, Dr Kirkhope made three requests under the Freedom of Information Act 2000 (FOIA from now on) in respect of three specimen sections in legislation. For each, he asked for 'copies of any memos, file notes correspondence associated with the drafting of provisions ... which exempted the Duchy from criminal liability.' The statutes were drafted by Parliamentary Counsel. The Cabinet Office is the responsible Government Department.

2. Each of these appeals deals with one of the three sections. They are:

Section 66A of the Wildlife and Countryside Act 1981, inserted by the Natural Environment and Rural Communities Act 2006:

> **66A Application of Part 1 to Crown**
>
> (1) Subject to subsections (2) to (5), Part 1 and regulations and orders made under it bind the Crown.
>
> (2) No contravention by the Crown of any provision of Part 1 makes the Crown criminally liable; but the High Court may, on the application of any person appearing to the Court to have an interest, declare unlawful an act or omission of the Crown which constitutes such a contravention.
>
> (3) Despite subsection (2), Part 1 applies to persons in the public service of the Crown as it applies to other persons.
>
> (4) But the powers conferred by sections 18A to 19XA are not exercisable in relation to premises occupied by the Crown.
>
> (5) Nothing in this Part affects Her Majesty in her private capacity.
>
> (6) Subsection (5) is to be read as if section 38(3) of the Crown Proceedings Act 1947 (c. 44) (meaning of Her Majesty in her private capacity) were contained in this Act

Section 221 of the Water Industry Act 1991, as substituted by the Environment Act 1995:

221 Crown application

(1) Subject to the provisions of this section, this Act shall bind the Crown.

(2) No contravention by the Crown of any provision made by or under this Act shall make the Crown criminally liable; but the High Court may, on the application of the Environment Agency, a water undertaker or a sewerage undertaker, declare unlawful any act or omission of the Crown which constitutes such a contravention.

(3) Notwithstanding anything in subsection (2) above, any provision made by or under this Act shall apply to persons in the public service of the Crown as it applies to other persons.

(4) If the Secretary of State certifies that it appears to him, as respects any Crown premises and any powers of entry exercisable in relation to them specified in the certificate, that it is requisite or expedient that, in the interests of national security, the powers should not be exercisable in relation to those premises, those powers shall not be exercisable in relation to those premises.

(5) Nothing in this section shall be taken as in any way affecting Her Majesty in her private capacity; and this subsection shall be construed as if section 38(3) of the M1Crown Proceedings Act 1947 (interpretation of references to Her Majesty in her private capacity) were contained in this Act.

(6) Subject to subsections (4) and (5) above, the powers conferred by sections 155, 159, 161(2) and 167 above shall be exercisable in relation to land in which there is a Crown or Duchy interest only with the consent of the appropriate authority.

(7) In this section—

'the appropriate authority' has the same meaning as it has in Part XIII of the Town and Country Planning Act 1990 by virtue of section 293(2) of that Act;

'Crown or Duchy interest' means an interest which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster, or to the Duchy of Cornwall, or belonging to a government department or held in trust for Her Majesty for the purposes of a government department;

'Crown premises' means premises held by or on behalf of the Crown.

(8) The provisions of subsection (3) of section 293 of the Town and Country Planning Act 1990 (questions relating to Crown application) as to the determination of questions shall apply for the purposes of this section.

Section 63 of the Data Protection Act 1998:

> **63 Application to Crown**
>
> (1) This Act binds the Crown.
>
> (2) For the purposes of this Act each government department shall be treated as a person separate from any other government department.
>
> (3) Where the purposes for which and the manner in which any personal data are, or are to be, processed are determined by any person acting on behalf of the Royal Household, the Duchy of Lancaster or the Duchy of Cornwall, the data controller in respect of those data for the purposes of this Act shall be—
>
> (a) in relation to the Royal Household, the Keeper of the Privy Purse,
>
> (b) in relation to the Duchy of Lancaster, such person as the Chancellor of the Duchy appoints, and
>
> (c) in relation to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints.
>
> (4) Different persons may be appointed under subsection (3)(b) or (c) for different purposes.
>
> (5) Neither a government department nor a person who is a data controller by virtue of subsection (3) shall be liable to prosecution under this Act, but sections 54A and 55 and paragraph 12 of Schedule 9 shall apply to a person in the service of the Crown as they apply to any other person.

3. The Cabinet refused to disclose the information and its decisions were upheld by the Information Commissioner.

B. FOIA

4. Section 1(1)(b) provides that 'Any person making a request for information to a public authority is entitled ... to have that information communicated to him.'

5. In each case, the Cabinet Office relied on exemptions in sections 35(1)(a) and 42(1) of FOIA. The Information Commissioner decided that the information sought was exempt under section 42, as did the First-tier Tribunal on appeal. In those circumstances, I refer only to that section.

6. Section 42(1) deals with information covered by legal professional privilege, which it classifies as exempt information: 'Information in respect of which legal professional privilege ... could be maintained in legal proceedings is exempt information.'

7. As section 42 is not listed in section 2(3) as an absolute exemption, section 2(2)(b) provides that '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 ... in all the circumstances of the case, the public interest in

maintaining the exemption outweighs the public interest in disclosing the information.'

C. The First-tier Tribunal's decisions

8. Dr Kirkhope exercised his right of appeal to the First-tier Tribunal, but the tribunal confirmed the Information Commissioner's decisions. Its reasons set out by way of background how statute law applies to the Duchy of Cornwall and the role of Parliamentary Counsel. The reasons continued by summarising the requests, the Cabinet Office's responses and the Information Commissioner's decisions. There followed a statement of the nature of an appeal under section 58 of FOIA and of the evidence adduced on the appeal. The reasons then dealt with the purpose of legal advice privilege and found that all the closed material involved legal advice. Finally, the reasons dealt with the public interests, setting out the parties' arguments and explaining why and how it assessed their comparative importance.

D. The appeal to the Upper Tribunal

9. Dr Kirkhope applied for permission to appeal against the decisions of the First-tier Tribunal. I held an oral hearing of the application and gave permission to appeal. I directed an oral hearing of the appeals, which was held on 11 July 2016. Dr Kirkhope attended and spoke on his own behalf, assisted by Dr Julian Farrand. Ms Christina Michalos of counsel appeared for the Cabinet Office. I am grateful to all three for their assistance. I am particularly grateful to Ms Michalos for her assistance in presenting her argument on the closed material in a way that prevented the need to conduct a closed hearing. The Information Commissioner did not take part, either in writing or at the hearing.

E. Analysis of the arguments

Section 2(2)(b)

10. I have read the closed material in respect of each of the three sections covered by Dr Kirkhope's requests. Almost all of it could, in my opinion, be disclosed without any harm and to the enlightenment of those like Dr Kirkhope who wish to understand the pre-Parliamentary stage of the preparation of legislation. But that is not how section 2(2)(b) operates. It requires a comparison of the public interest in maintaining the exemption and the public interest in disclosing the information. I confess that I prefer to avoid using the statutory term 'outweighs' as it is a metaphor that does not reveal the nature of the process. As I understand it, what is required is a comparative analysis of the importance or significance of the factors on either side. That, in turn, requires an analysis of the values underlying the different public interests.

The public interest in maintaining the exemption - legal professional privilege

11. Dr Kirkhope argued that there was no litigation involved in these cases. He was right about that. As a result, I am concerned with that form of privilege known as legal advice privilege. The lack of a litigation context does not prevent

legal advice privilege applying to advice given by Parliamentary Counsel: *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at [41].

12. The absence of any litigation may be relevant to the reason why legal advice privilege exists. What values does it promote in the drafting context? Its policy was discussed, in the context of litigation, by Lord Scott in *Three Rivers*:

> 28. So I must now come to policy. Why is it that the law has afforded this special privilege to communications between lawyers and their clients that it has denied to all other confidential communications? In relation to all other confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality of the communication, will protect the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice. In relation to all these other confidential communications the law requires the public interest in the preservation of confidences and the private interest of the parties in maintaining the confidentiality of their communications to be balanced against the administration of justice reasons for requiring disclosure of the confidential material. There is a strong public interest that in criminal cases the innocent should be acquitted and the guilty convicted, that in civil cases the claimant should succeed if he is entitled to do so and should fail if he is not, that every trial should be a fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to be taken into account. These are the administration of justice reasons to be placed in the balance. They will usually prevail.

Then, after citing some passages from cases in this country and abroad, Lord Scott said:

> 34. None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in

> common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else (see also paras. 15.8 to 15.10 of Adrian Zuckerman's Civil Procedure where the author refers to the rationale underlying legal advice privilege as 'the rule of law rationale'). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.

13. Those remarks were made in a different context from the drafting of legislation. The First-tier Tribunal had to apply them to that context. In doing so, the tribunal had two valuable sources. One was a publication entitled **Working with Parliamentary Counsel** of 6 December 2011. It was obviously a work in progress, as some sections remained to be completed. In its incomplete form, it covered 75 pages and dealt in detail with the role of Parliamentary Counsel and their relationship with the Departments for whom they drafted legislation. It explains in more detail the process that is understood, at least in general terms, by all lawyers. Its content was not in dispute; it is available on the web.

14. The other source of evidence available to the First-tier Tribunal was a witness statement by David Sprackling, a Full Parliamentary Counsel and one of four team leaders. Ms Michalos pressed on me the importance of the whole of this statement. Mr Sprackling explained the role of candour in order that there should be clarity about the policy aims of the legislation, with the Department setting out the issues and exposing its thinking as fully and clearly as possible 'in an environment that enables, fosters and protects a free and frank exchange of views.' He gave the opinion of all the team leaders that 'If the disputed information were ordered to be disclosed I have no doubt that this would have a significant detrimental effect on the preparation of future legislation.'

15. As I read the First-tier Tribunal's decision, it did not doubt the importance of candour as Mr Sprackling explained it. That was right. Candour has a value that is wider and more important than the particular content of the advice. It underlies not only legal advice privilege, but a number of other provisions in FOIA. Without intending to be exhaustive, it is part of the rationale for exemptions relating to:

- formulating or developing Government policy under section 35(1)(a);
- Law Officers' advice under section 35(1)(c);
- collective Ministerial responsibility under section 36(2)(a)(i);
- free and frank provision of advice and exchange of views for the purposes of deliberation under section 36(2)(b)(i) and (ii).

Section 42 alone and in conjunction with these other provisions allows space in which advice can be given and decisions made by Government beyond public

scrutiny. Dr Farrand was right to point out that the pre-Parliamentary stage of legislation was secret, but that is the policy contained in provisions like section 42, subject to the balance of public interests.

16. What the tribunal did not accept from Mr Sprackling's evidence was his assessment of the impact that disclosure in these cases would have on the future conduct of business. It said:

> Although we give due weight to Mr Sprackling's long experience and views of how the OPC [Office of Parliamentary Counsel] operates today and may operate in the future, we believe that he adopted too pessimistic a view of his colleague's likely response to any decision to order disclosure in the circumstances of this particular case. If disclosure were ordered to be made prematurely and/or as a matter of routine his concerns may have been justified, but disclosures made as a result of the proper operation of the rules, embedded in the FOIA and case law arising under it, ought not to have the stifling effect that he feared, particularly in the light of the length of time that has passed since the Bills in question passed into law.

17. Ms Michalos argued that the evidence was entitled to more respect than that and that the tribunal should have accepted the statement in full. I do not accept that argument. The tribunal's assessment was rational and clearly explained. It had to assess the evidence in the context that legal advice privilege is not an absolute exemption under FOIA. That was a point made by Dr Kirkhope and he was right to emphasise it: *Department for Business, Enterprise and Regulatory Reform v O'Brien and the Information Commissioner* [2009] EWHC 164 (QB) at [41]. Every communication between Parliamentary Counsel and the relevant Department is made with the knowledge, and subject to the risk, that at some time in the future the comparative importance of confidence and disclosure might lie in favour of the latter. That has been the case since FOIA came into force. At least from that date, all involved in the drafting of legislation should have been communicating on that basis. The disclosure of the information sought in these cases should not cause any change. Blake J made the same point in relation to the Law Officers' Convention on non-disclosure of advice in *HM Treasury v Information Commissioner and Owen* [2009] EWHC 1811 (Admin) at [64].

18. In conclusion on the public interest in maintaining the exemption:

- there was no dispute about the nature of the drafting process;
- the tribunal correctly identified the relevant values promoted by legal advice privilege;
- and it was entitled to conclude that disclosure, in a case where the balance of the public interests otherwise required it, would not have a stifling or chilling effect on the effective conduct of work of Parliamentary Counsel.

There is no error of law on this aspect of the tribunal's decision.

The public interest in disclosing the information

19. Dr Kirkhope argued that he did not have to show any exceptional circumstances in order to justify disclosure. I accept that: *Department for Business, Enterprise and Regulatory Reform v O'Brien and the Information Commissioner* [2009] EWHC 164 (QB) at [41]. He also argued that transparency and accountability in Government are themselves public interests that favour disclosure. I accept that: *HM Treasury v Information Commissioner and Owen* [2009] EWHC 1811 (Admin) at [64]. But, as I have said, one policy that underlies a number of exemptions is the protection for the conduct of Government business before its policy decisions are made public. Transparency and accountability alone cannot trump that policy. Dr Kirkhope also argued that, as the Duchy of Cornwall had little or no public function and was essentially a private estate, there is a public interest in understanding why it is exempt from criminal liability and in understanding why particular formulations are used in different contexts. I accept that.

20. Dr Kirkhope referred me to what Wyn Williams J said in *Department for Business, Enterprise and Regulatory Reform v O'Brien and the Information Commissioner* [2009] EWHC 164 (QB):

> 48. … In the light of the consistent line taken by the Tribunal as to the weight to be attached to the public interest against disclosure in-built into legal professional privilege (an approach which I have found to be the correct one) it was incumbent upon the Tribunal in the instant case to give significant weight to that interest. Further the Tribunal was obliged to consider whether the weight to be given to the public interest considerations militating against disclosure were countered by considerations of at least an equal weight which supported an order for disclosure.
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> 49. On this issue I accept the submissions of Mr Havers QC that there is nothing in the decision and for the avoidance of doubt in Rider D which demonstrates that the Tribunal has undertaken the necessary assessment. …

Dr Kirkhope argued that the First-tier Tribunal had failed to undertake an assessment of the nature required and had not given sufficient consideration to the case for disclosure. I do not accept that argument.

21. The tribunal expressly acknowledged the importance to be attached to legal advice privilege. It went on:

> 39. The difficulty the Appellant faces in presenting his case for disclosure arises from the conclusion we are forced to reach as a result of our consideration of the withheld information. While acknowledging that the detailed content of the closed bundle must remain confidential, we can say that it disclosed nothing that would throw any significant light on the concerns the Appellant had articulated about the granting of immunity and the reasons for doing so.

That is not the whole passage, but I break off to deal with Dr Kirkhope's specific criticism of the last sentence. He argued that FOIA is applicant and motive blind. There is some truth in those remarks, which are often made. But they are misleading if applied generally. In assessing the public interest in favour of disclosure, Dr Kirkhope did not have to explain the nature of his interest. He was right to make that point. But this does not mean that the nature of his interest could not be taken into account if he chose to reveal it. Indeed, it may be helpful for the Information Commissioner and the tribunal to know what it is, so that it can take it fully into account in the assessment it has to make.

22. I now return to paragraph 39 of the tribunal's reasons:

> As we have indicated, the role of the OPC is to help government departments to carry through into effective legislation the policies that they have already settled upon. The OPC therefore operates too far removed from the general policy making debate for its files to be likely to contain (and nor did they contain) any material throwing significant light on how or why the policy was developed. Nor did the material support the Appellant's concerns that the OPC might have been in the habit of adopting a standard approach to crown application in any legislation it was instructed to draft. On the contrary, the content of the closed bundle supported Mr Sprackling's evidence and the content of the pamphlet referred to in paragraph 4 above, demonstrated to our satisfaction that each case had been considered on its merits and thought given, on each draft bill, to the proper approach to take on the detailed drafting of crown application provisions.

23. That is the passage in which the tribunal considered the case for disclosure. As I understood Dr Kirkhope's argument, it was not that the tribunal did not undertake an assessment, but that the assessment did not comply with the standard set by Wyn Williams J and did not attach sufficient importance to the case for disclosure. I do not accept that. The passage must, of course, be read in the context of the material that has not been disclosed. I will try to be a little more explicit about what the tribunal meant.

24. At the hearing, I said that much of the advice given by Parliamentary Counsel in the closed material simply involved explaining the nature of criminal liability when an employee did something wrong. It could just as easily have been given, I said, by providing a photocopy of some pages from a criminal law textbook. Ms Michalos did not accept that, but I stand by it. It is not true of all the advice, but it is true of a substantial part. There is little or no public interest in that sort of information being disclosed.

25. All of the closed material shows a concern that both sides, the Department and the Counsel responsible, should understand each other clearly, and a determination to produce a draft clause that furthered the general policy whilst fitting the particular context of the legislation and the issues that might arise under it. It is fascinating to see that process unfold. It is in some ways very similar to the public exchanges that take place in the Parliamentary and Committee stages of the Bill with difficulties being discussed and amendments being proposed. As Dr Farrand said, the legislative process is public but the

drafting process remains secret. That is right, subject to the possibility of disclosure under FOIA. I am sure there is a public interest in seeing behind of the scenes, but the issue is whether it is more important than the privacy and confidentiality that protects the discussion. The tribunal's assessment was that it was not. That assessment was made, as it had to be, in the context of the information sought. I consider that the tribunal was entitled to make that assessment and, for that matter, right to do so. The distinction between the drafting and legislative stages is a rational one that allows those involved to produce the draft that will form the first public consideration. It allows those involved to make mistakes in private and to decide precisely what to do and how to do it without the pressure of public scrutiny, but without hampering any later public and Parliamentary discussion. Legal advice privilege, applied to the drafting of legislation, embodies that compromise and there is value in maintaining it, not in order to protect the individuals involved, but to enhance the quality of the legislation produced. The tribunal's judgment was that the public interest in disclosure of the information sought by Dr Kirkhope was less significant than the public interest in maintaining the exemption.

26. Dr Kirkhope drew attention to the age of the advice and to the fact that a record became part of the historical record after 20 years (section 62(1) of FOIA) and so outside the scope of section 42 (section 63(1)). He referred me to paragraph 28(x) of the decision of the First-tier Tribunal in *Szucs v Information Commissioner* EA/2011/0072. Ms Michalos reminded me that: (i) any relevance of time had to be considered at the date of the request, not at the date of the hearing; (ii) the 20 year period was subject to transitional arrangements; and (iii) section 62(2) provided that a record held in a file or other assembly was created on the date when the last item was added to it.

27. Time is, potentially, a relevant factor. It would be wrong, though, to use it in a way that rewrote the statutory time limit for disclosure as part of the historical record. If that time is close to expiring, it would be necessary to show a public interest in having the information immediately rather than waiting for the document to become part of the historical record. Time is most likely to be relevant as either showing that the information is no longer of any continuing significance or reflecting that current circumstances require a different analysis of the comparative public interests involved. In the cases before me, the closed material shows that each section received individual attention, but also that this can involve reference to what was done in other statutes.

28. As to *Szucs*, this was a First-tier Tribunal decision. It is not binding on me and, as a general principle, it is not helpful to cite First-tier Tribunal decisions to the Upper Tribunal. The passage to which I was referred is in a section dealing with the general principles of the public interest test and reads:

> The age of the legal advice contained in the information is relevant. The passage of time would, as a general principle, favour disclosure. Legal advice is, however, still 'live' if it is still being implemented or relied upon as at the date of the request or may continue beyond that date to give rise to legal challenges by those unhappy with the course of action adopted.

That was said in the context of a request for information in relation to a long-running and ongoing dispute with the Intellectual Property Office relating to a complaint against a patent agent. The tribunal decided that the information should not be disclosed. Paragraph 28(x) contained the last of 10 points of general principle that it set out. The reference to time had to be taken into account as but one of the factors relevant in the case as a whole. I have no difficulty with the point as stated, provided that it is understood (as it was written) as part of an overall analysis.

29. Finally, Dr Farrand made the point in response to one of my comments that if the information sought contained no 'smoking gun', that of itself would be of value. I accept Dr Farrand's argument in principle. I can envisage cases in which it might apply and could, potentially, tip the balance in favour of disclosure. I cannot, though, see anything in the information sought or in the circumstances of these cases that would justify this approach. I say that with the advantage, which Dr Farrand did not have, of having read the closed material.

30. In conclusion on the public interest in disclosing the information:

- Dr Kirkhope's appeals failed because he could not identify a public interest whose values were sufficiently important to take precedence over the public interest in maintaining the legal advice privilege exemption;
- that is the essence of the tribunal's explanation;
- the tribunal was right that the closed material did not show how Government policy had been formulated;
- nor did it show a standard approach to the drafting of Crown application clauses, quite the reverse;
- having seen the closed material, it confirms the value of the basic policy underlying section 42 rather than supports any countervailing public policy that would permit disclosure.

Signed on original
on 19 July 2016

Edward Jacobs
Upper Tribunal Judge