Information Commissioner's Office

ICO Hearing 36-00713
Decision

Ministry of Education, Employment & Gender Affairs
and The Department of Labour and Pensions

Jennifer Dilbert MBE, JP
Information Commissioner for the Cayman Islands

8 November 2013

Summary:

An Applicant was refused access by the Department of Labour and Pensions (DLP) to a record relating to the Applicant's own case with the then Department of Employment Relations (DER), relating to non-payment of overtime benefits.

The Information Commissioner overturned the decision of the Ministry of Education, Employment & Gender Affairs and The Department of Labour and Pensions to withhold the responsive record in this Hearing, and required that the record be disclosed.

Statutes[1] Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008

Contents:

[1] In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

A. INTRODUCTION

[1] The Applicant requested a number of records from the Department of Labour and Pensions (DLP) on 14 January 2013. On 14 February the Applicant was advised by the Information Manager of DLP that access would be granted to the requested records, but due to the large volume of records the Applicant was invited to visit their Offices to inspect them.

[2] On 18 February, the DLP released copies of the records to the Applicant. Upon reading them, and having been advised by the DLP that all files responsive to the request had been provided, the Applicant strongly believed that further responsive records should exist, and on 3 March requested an Internal Review under the *Freedom of Information Law, 2007 (*FOI Law).

[3] The Internal Review was not completed by the deadline allowed by the FOI Law, which was 2 April, and on 3 April the Applicant appealed to the Information Commissioner's Office (ICO). On 12 April a Deputy Chief Officer of the then Ministry of Education, Training and Employment wrote to the Applicant confirming that he intended to finalize the Ministry's investigation and provide a formal response.

[4] While the Ministry of Education, Employment & Gender Affairs (the Ministry) contends that an Internal Review was completed on 9 April, despite several requests from my Office in the course of this appeal, neither the ICO nor the Applicant has been provided with a completed Internal Review. In any event, 9 April would have been a week after the allowed time period of an internal review had passed, and 6 days after the Applicant had already appealed the matter to the ICO as they are entitled to do.

[5] During the ICO's pre-hearing investigation, further records were provided to the Applicant, but the Applicant maintained that it could be seen from the records provided that additional records, in particular correspondence from the Director of Public Prosecutions concerning the case, must exist.

[6] On 25 June the ICO requested that the Ministry or the DLP provide an affidavit explaining why a record discussed with the Applicant and mentioned in emails to the Applicant did not appear to exist or could not be located.

[7] On 16 July the Ministry provided the ICO with an affidavit to which it attached a copy of a record sent to the Director of Employment Relations by the Director of Public Prosecutions, which related to the Applicant's case and was therefore responsive to the FOI request. The Ministry claimed the exemption in section 17(a) in relation to this record.

[8] On 19 July the Applicant was denied access to this record, which is the issue under review in this Hearing.

[9] The record in dispute in this Hearing is therefore a record sent to the DLP by the Director of Public Prosecutions.

B. BACKGROUND

[10] As per the Cayman Islands Government's Organizational Chart of 1 July 2013, The Department for Labour and Pensions currently falls under the Ministry of Education, Employment & Gender Affairs. Prior to this, responsibility for the DLP and the former Department of Employment Relations fell to the former Ministry of Education, Training and Employment. The role of the DLP is primarily to enforce the labour and pensions legislation of the Cayman Islands. It deals with individual disputes regarding matters such as non-payment of vacation pay, labour complaints regarding severance pay or unfair dismissals. The DLP refers unresolved complaints to the Labour Tribunal.

[11] The website for the Office of the Director of Public Prosecutions (ODPP), states that it is the Government's principal legal adviser on Criminal proceedings and is responsible for all criminal proceedings brought within the Cayman Islands.[2]

C. PROCEDURAL MATTERS

[12] Some delays were experienced with the commencement of the Hearing, primarily centred around the Ministry's insistence that the Internal Review was conducted on 9 April 2013. The Ministry has also given reasons why the Internal Review decision was not communicated to the Applicant. However, these reasons are irrelevant, as noted above, since to date neither the Applicant nor the ICO has been able to obtain a copy of this Internal Review from the Ministry. I can only conclude that the Internal Review was not done in accordance with the FOI Law.

[13] However, the jurisdiction of the ICO to deal with this case is not in question, and submissions have been made on behalf of the Ministry by the Legal Department. The DLP initially claimed exemptions under sections 16(b)(i), 16(d) and 17(a). However in their submission the exemptions under section 16 have been abandoned and the Public Authority relies solely on 17(a) which relates to legal professional privilege.

[14] The Ministry advised that the responsive record did not come into the possession of the DLP until 10 July 2013, although it dates back to 2011. It is surprising and not acceptable that this record could not be located during the entire life of the request and appeal, and was found only when the public authority was required to provide the ICO with an affidavit attesting to the fact that all responsive records relating to the Applicant's request had been provided to the Applicant or the ICO.

[15] At best, this is an example of extremely poor record keeping on the part of the DLP at the time, which is disturbing as the Department has a key function in respect of safeguarding employment rights in the Cayman Islands. At worst, the inability of the DLP to locate this record could be perceived as an attempt to conceal it, either at this time or in the past. This important record should have been on the case file at the DLP, and it remains unexplained why it was not.

[16] Public authorities are reminded that section 52(1) of the Law requires that:

[2] ODPP website: http://www.judicial.ky/home/director-of-public-prosecutions/about-us-dpp

Every public authority shall maintain its records in a manner which facilitates access to information under this Law and in accordance with the code of practice provided for in subsection (3).

[17] It should also be noted that at section 55 the Law states:

A person commits an offence, if in relation to a record to which a right of access is conferred under this Law, he-

(a) alters or defaces;
(b) blocks or erases;
(c) destroys; or
(d) conceals,

the record with the intention of preventing its disclosure.

[18] I do not have such evidence in this case, but the ICO will not hesitate to seek to prosecute a public authority if it has evidence that section 55 of the Law has been contravened.

D. ISSUES UNDER REVIEW IN THIS HEARING

[19] The issue to be decided in this Hearing, as set out in the Notice of Hearing and Fact Report is:

Section 17(a) – Is the record sent to the Director of Employment Relations from the Director of Public prosecutions, relating to the Applicant's case, exempt from disclosure because it would be privileged from production in legal proceedings on the ground of legal professional privilege?

E. CONSIDERATION OF ISSUES UNDER REVIEW

[20] While it is helpful for any applicant to put forward arguments in support of their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

Section 17 (a)

This section provides:

17. An official record is exempt from disclosure if-

(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege …

The position of the DLP

[21] In their submission DLP states that the purpose of legal professional privilege is to enable legal advice to be sought and given in confidence. They cite **Balabel and Another v. Air India [1988] 1 Ch. 317** and state that "legal professional privilege protects confidential communication between a lawyer and his or her client made for the dominant purpose of seeking or giving legal advice or professional assistance, or for use, or obtaining material for use, in legal proceedings that had commenced or were reasonably anticipated, at the time of the relevant communication".

[22] The well-known case of **Three Rivers DC v. Bank of England (No. 6) [2004] UKHL 48** is referred to and the DLP state the fact that modern case law has divided privilege into two categories, legal advice privilege and litigation privilege.

[23] Again citing **Three Rivers**, the DLP go on to state that "legal advice privilege arises out of a relationship of confidence between lawyer and client. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally be sought or given in circumstances and for purposes that have nothing to do with litigation."

[24] They then quote from the judges of the House of Lord[s] in **Three Rivers:**

> *It was desirable as a matter of public policy that communication between client and their lawyers for the purpose of obtaining legal advice should be privileged from discovery notwithstanding that as a result cases might have to be decided in the absence of relevant probative material.*

[25] The DLP then proposes that the rulings of the Information and Privacy Commissioner of Ontario in his in his **Order PO – 2162 – Ministry of Labour (Information and Privacy Commissioner/Ontario)** are strongly persuasive and are also supportive of DLP's decision to withhold the record. They briefly describe the case and its conclusion that the communication was confidential.

[26] They point out that in this case, the issue arose whether the communication was made within the context of a solicitor-client relationship, and state that the Commissioner adopted a "functional" definition of solicitor-client privilege, quoting from the Supreme Court of Canada case of **R. v Campbell [1999] 1 SCR 565** which stated:

> *Where legal advice of any kind is sought from a professional legal adviser in his capacity as such the communication relating to that purpose made in confidence by the client are at his instance permanently protected from disclosure by himself or by the legal adviser except the protection be waived.*

[27] While citing the above cases, the DLP does not show how these cases relate to the instant case, or how the responsive record meets the criteria for legal professional privilege to attach. They simply quote the cases as set out above and submit that the appeal filed by the Applicant should be dismissed as disclosure of the responsive record would "significantly erode the concept of legal professional privilege" and it is exempt from disclosure by virtue of section 17 (a).

[28] In their reply Submission, the DLP focuses on the Applicant's question as to who is the client in this case. They point out that Section 12(1) of the Criminal Procedure Code (2011 Revision) states that:

> *…the Director of Public Prosecutions and any legal practitioner instructed for the purpose by the Director of Public Prosecutions may appear to prosecute on behalf of the Crown, the Commissioner of Police or any other public officer, public authority or department of Government in any criminal proceedings before any court.*

[29] The DLP submits that :

> It is clear from the provisions of this section that the Office of the Director of Public Prosecutions (ODPP) prosecutes matters on behalf of the Crown and not members of the public. Notwithstanding the fact that the Applicant in this matter made the complaint, [the Applicant] is not the ODPP's client and they do not act on [the Applicant's] behalf nor do they take instructions from [the Applicant]. A breach of the Laws of the Cayman Islands is an offence against the State, therefore in criminal prosecutions it is State against the individual or entity.

[30] Finally, the DLP quotes the case of **Breeze v Information Commissioner EA/2011/0057** and it submits that rulings and advice as to charge and later as to the sufficiency of the evidence were deemed to be under legal professional privilege and therefore exempt from disclosure.

[31] The DLP concludes in its Reply Submission that the public authority is the ODPP's client and there is no duty on the public authority or the ODPP to release the record to the Applicant as a matter of course.

The position of the Applicant

[32] The Applicant's submission deals mainly with some of the procedural issues discussed above, in particular the lack of relevant documents on the Applicant's file. According to the Applicant, these missing documents relate to correspondence between the then Department of Employment Relations (DER) and the Office of the Complaints Commissioner, when the applicant was told that the case was statute barred. Records also not provided to the Applicant were correspondence between the employer and the DER advising the employer of the consequences of not paying money that the DER had ordered them to pay. Finally the Applicant expected to see correspondence between the DER and 'Legal Department' (the correct public authority is the ODPP) advising of the submission of the file to the [ODPP], and [ODPP's] acknowledgement of same.

[33] The Applicant asserts that while being told that the case was closed because of advice from the [ODPP], if the responsive record is not disclosed, "how will I ever know if there was an actual advice and does this mean my case is still open".

[34] Finally, the Applicant refers to the fact that legal professional privilege protects confidential communication between a lawyer and his or her client, and questions who is the client in this case, stating: "since the [ODPP] was working on my behalf to collect from the company, the big question is, who is the client and can't a client see his or her own records?".

Discussion

[35] In its submission, the DLP presents a woefully inadequate level of arguments to support their application of section 17(a). While generally raising the various cases cited above, they do not elaborate or explain how these cases relate to the document being considered in the present Hearing.

[36] With respect to **Balabel and Another** [paragraph 21 above], although no arguments at all are presented by the DLP to support their claim of legal professional privilege, I will look at the two main issues in their quotes:

- The dominant purpose of seeking or giving both legal advice and/or professional assistance.

The responsive record in this case does not have a dominant purpose of seeking or giving legal advice and/or professional assistance. Four of five paragraphs set out a background and chronology of events, and the fifth paragraph states a conclusion. The only part of the responsive record which could conceivably be regarded as legal advice, and I wish to stress that I do not believe that this does constitute legal advice, is the final conclusion in relation to the Applicant's case, of which the Applicant has already been notified. I would therefore suggest that if indeed LPP attached to this conclusion, such privilege has been waived, and the Applicant is entitled to know the full context of this conclusion.

- For use, or obtaining material for use, in legal proceedings that had commenced or were reasonably anticipated, at the time of the relevant communication.

It is clear from the record and to the background of this case that legal proceedings had not commenced, nor were they reasonably anticipated, at the time of the creation of the record which has been requested.

[37] Again, as set out at paragraphs [22] and [23] above, the DLP has presented two quotes from **Three Rivers**, but has not presented any arguments, comparisons or parallels to support the case in hand. I can only say that I am aware of the facts that privilege is divided into two categories, legal advice privilege and litigation privilege; that legal advice privilege arises out of a relationship of confidence between lawyer and client; and that legal advice is frequently sought or given in connection with current or contemplated litigation, but it may equally be sought or given in circumstances and for purposes that have nothing to do with litigation.

[38] As per paragraph [24] above, the DLP again quotes from the **Three Rivers** case but have given no indication as to what point they are trying to make with respect to the present case. I cannot therefore comment on this quote or its relevance to this case.

[39] Although not specifically discussed, the DLP seems to have considered whether a solicitor-client relationship existed between them and the ODPP, as in their submission they make reference to this issue following a description of a case before the Information and Privacy Commissioner of Ontario.

- The existence of a solicitor-client relationship.

The DLP does not show how the relationship between the Police Officer and counsel in the Canadian case compares to the relationship between the ODPP and the DLP, or how this case supports the existence of a client-solicitor relationship between the ODPP and the DLP. In any event in the Canadian case clear advice was sought and given to the police by the Department of Justice as to the legality of the actions of the police. In his Order the Commissioner states:

> *Having carefully reviewed the contents of the records, in my view … all fall squarely within the scope of common law solicitor-client communication privilege. Each of them is an e-mail communication … created by Ministry counsel and sent directly to his Ministry client. The content of each record relates to the provision of legal advice, specifically his intended approach to prosecutions under the OHSA stemming from the investigation undertaken by the Ministry client. It is reasonable, in the circumstances, to conclude that both counsel and client would treat communications of this nature confidentially.*

[40] This is quite different to the circumstances in the case under consideration here, where the responsive record in this Hearing contains no similar advice to the DLP from the ODPP, or, as the proper parallel to the Ontario Department of Justice, from the Attorney General's Chambers.

[41] I point out that in **R. v Campbell**, quoted by the Commissioner in the cited case, while the Court found that the consultation by an officer of the Royal Canadian Mounted Police (RCMP) with a Department of Justice lawyer over the legality of a proposed reverse sting operation by the RCMP fell squarely within the functional definition of legal professional privilege, it went on to emphasize that:

> *…it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege,… whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.*

[42] The DLP has not addressed these issues at all, offering me no submissions as to the nature of the relationship, or why the subject matter of the advice, or the circumstances in which it is sought and rendered demonstrates a solicitor-client relationship.

[43] They submit that the Applicant is not the client of the ODPP, as "the ODPP prosecutes matters on behalf of the Crown and not members of the public". While I accept that the Applicant is not the client of the OPP, the DLP has not demonstrated to me that indeed a client-solicitor relationship exists between the ODPP and the DLP.

[44] In looking at both whether a solicitor client relationship exists, and whether the communication occurred within a "relevant legal context" as defined in **Three Rivers,** I draw on Legal Guidance from the UK Crown Prosecution Service (CPS)[3] which has a very similar role as the Office of the Director of Public Prosecutions in the Cayman Islands. While this Guidance relates to CPS relations with the police, we can make some useful comparisons with respect to its treatment of legal professional privilege.

[3] Crown Prosecution website: www.cps.gov.uk/legal/a_to_c/cps_relations_with_the_police/

[45] This guidance states [their emphasis]:

> *LPP cannot **normally** apply to communications and documents passing between the CPS and the police because the relationship is not analogous to that of a private law firm or barristers' chambers advising or conducting litigation on the behalf of a private client. The relationship between the CPS and the police is not a solicitor client relationship. The CPS is an independent prosecuting authority created by statute, which has broad powers and extensive duties relating to the advising and prosecuting of criminal cases. The role of the CPS is to act for the public and to act in the public interest. Furthermore, the relationship that exists between the CPS and the police is governed by statute. The police have no choice in who should conduct a public prosecution, unlike a member of the public who has the freedom of instructing any solicitor. The police provide information to prosecutors in order for decisions to be taken as to whether a prosecution is appropriate, what charges should be sought or whether an investigative technique would be admissible as evidence at trial.*
>
> *It is clear that the public policy grounds for the justification of LPP are inappropriate when transposed into the area of public prosecutions ...*

[46] The Guidance accepts that in "extremely rare circumstances", the police can effectively become the client of the CPS, for example if the police were seeking legal advice for their own benefit. DLP has not presented any evidence that they were seeking legal advice, neither for their own benefit nor for any other reason.

[47] In any event, the Guidance goes on to say that in any unclear situation, the test to be applied is whether the advice given or communication occurred within a "relevant legal context" as defined by the House of Lords in **Three Rivers**. In that case, Scott LJ ruled that "unless there is a relevant legal context, legal advice privilege will not be applicable", and set out a three stage test for deciding whether legal professional privilege had arisen in a particular set of circumstances:

> *i. Does the advice relate to the rights, liabilities, obligations or remedies of the client either under private law or under public law? If so;*
> *ii. Does the communication fall within the policy underlying the justification for legal advice privilege in our law?*
> *iii. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect privilege to apply?*

[48] The DLP's Submission does not consider this test, nor does it put forward any arguments that address it, and upon consideration I do not find that the responsive record in this Hearing, that is, a record sent to the DLP by the Director of Public Prosecutions, occurred within a relevant legal context for legal professional privilege to apply. This is because I do not find that the record contains advice which relates to the rights, liabilities, obligations or remedies open to the DLP. The ODPP is simply setting out the chronology of the case, and stating a procedural Conclusion which has already been communicated to the Applicant.

[49] I note that the DLP claims that in the case of **Breeze v Information Commissioner**, "rulings and advice as to charge and later as to the sufficiency of the evidence was deemed as legal professional privilege and exempt from disclosure".

[50] The reference provided by DLP in relation to this case is muddled, in that it appears to confuse three sources: (1) the decision of the Commissioner with reference FS50317438, (2) the decision upon appeal by the First Tier Tribunal in the same case, for which DLP provides no reference, and (3) an article in a legal blog published on 25 March 2012, entitled "Breeze v Information Commissioner – Investigations".[4]

[51] In his decision the UK Commissioner found that the information had been correctly withheld under section 30 of the *Freedom of Information Act, 2000*, relating to investigations and proceedings, for which there is no exact parallel in the Cayman Islands FOI Law. Legal professional privilege was not raised or considered.

[52] The subject matter of the **Breeze** case was a summary of the evidence presented to the Crown Prosecuting Service following a police investigation. The focus was on the actions and decisions of the CPS itself. When the matter was appealed, LPP was again not considered, but the Tribunal asked whether the CPS would waive the privilege associated with the advice provided to them by independent counsel – which CPS chose not to do. The question of privilege therefore applied only marginally to this case, and was raised *in passing* by the Tribunal in relation to the advice from independent counsel to CPS, not to a communication from CPS itself as in the present case.

[53] Relevant to the **Breeze** case, a statement by the Solicitor General in Parliament had already disclosed "a quite detailed account of the history of the case. It dealt with the decision to charge and stated unequivocally that the case should not have proceeded to court."[5] Consequently, the Tribunal found that "to a very substantial degree the information which might be provided by disclosure of the Case Summary is already in the public domain".[6] The information in the withheld record in the present case is akin to the charging decision, which was substantially disclosed by the UK's Solicitor-General.

[54] In conclusion, legal professional privilege, the sole exemption claimed by DLP in the present case, was very marginal in **Breeze**. In the present case the responsive record does not contain advice from independent counsel. The UK Solicitor General actually disclosed information on the charge that is under consideration in the present case. For these reasons I do not find that the **Breeze** case supports the DLP's position.

[55] For the reasons set out above, I find that the DLP has not demonstrated to me that in this case, a solicitor-client relationship existed between the DLP and the ODPP, nor that the communication occurred within a relevant legal context for legal professional privilege to attach to the record.

---

[4] Rachel Kamm "Breeze v Information Commissioner – Investigations" in: Panopticon, 25 March 2012 : www.panopticonblog.com/2012/03/25/breeze-v-information-commissioner-investigations-and-personal-data/

[5] Breeze EA/2011/0057 para 25

[6] Breeze EA/2011/0057 para 34

F. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law, 2007*, I make the following findings and decision:

Findings:

(a) I find that the record sent to the Director of Employment Relations from the Director of Public prosecutions, relating to the Applicant's case, is not exempt from disclosure under section 17(a) of *The Freedom of Information Law, 2007*.

(b) I find that the Department of Labour and Pensions is in contravention of section 52(1) of the Law.

Decision:

(a) Under section 43(3)(a) I overturn the decision of the Ministry of Education, Employment & Gender Affairs and The Department of Labour and Pensions to withhold the responsive record in this Hearing and require that the record be disclosed.

(b) Under section 43(3)(b) I require the DLP to take such steps as may be necessary to bring it into compliance with its obligations under section 52(1) of the Law.

As per section 47 of the *Freedom of Information Law,* 2007, the complainant, or the relevant public body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application be sent to my Office immediately upon submission to the Court.

Pursuant to section 48, upon expiry of the forty-five day period for appeals referred to in section 47, the Commissioner may certify in writing to the court any failure to comply with this Decision and the court may consider such failure under the rules relating to contempt of court.

Jennifer Dilbert
Information Commissioner

8 November 2013