



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0033

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50161898
Dated: 21 December 2009**

Appellant: MR PETER DUNN

Respondent: INFORMATION COMMISSIONER

**Additional Party: DEPARTMENT FOR CENTRAL AND LOCAL
GOVERNMENT**

Determined following a paper hearing on 9 November 2010

Before

Robin Callender Smith
Tribunal Judge

and

**SUZANNE COSGRAVE
MARION SAUNDERS**
Tribunal Members

For the Appellant: Mr Peter Dunn (in person)

For the Additional Party: George Peretz, Counsel instructed by TSol on behalf of
DCLG

For the Respondent: Mark Thorogood, Solicitor, on behalf of the Information
Commissioner

Subject matter:

Freedom of Information Act 2000

Duty to confirm or deny s.1 (1) (a)

Qualified exemptions

- Advice by Law Officers s. 35 (1) (c)
- Legal professional privilege s. 42

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the Appeal by Mr Dunn.

The Tribunal sets aside Paragraph 47 of the original Decision Notice - dealing with section 42 FOIA – because the “information sought” refers to information different to what was ultimately agreed to be before the Tribunal in this appeal.

The Tribunal finds that the Additional Party correctly withheld the closed material now before it in proper reliance on section 42 FOIA.

The Tribunal finds that the DCLG was not subject to a duty to confirm or deny whether it held material within the scope of the request and falling under section 35 (1) (c).

REASONS FOR DECISION

Introduction

1. Mr Peter Dunn ("the Appellant") requested information held by the Department for Communities and Local Government ("the Additional Party") about the legal advice obtained in relation to a Government decision to remove the "85 year rule" in 2006.
2. This rule – also known as the "rule of 85" – was one of the calculation criteria in Local Government Pension Schemes (LGPS) used to work out pension entitlement on the retirement of LGPS members.
3. The 85 year rule/calculation focused on the age of a member and the length of that individual's reckonable service when working out actuarial reduction in pension entitlements.
4. The 85 year rule allowed members to draw an unreduced pension at retirement if their age – plus their years of "pensionable" service – exceeded 85 years.
5. The Government decided to remove the 85 year rule with effect from 1 October 2006 as part of the Local Government Pension Scheme (Amendment) Regulations 2006 on the basis that it believed the 85 year rule was age-discriminatory.
6. UNISON (a trade union with an interest in this matter on behalf of its members) took a case to court to attempt to quash the removal of the 85 year rule. It believed that the decision was based on an erroneous understanding of the Government's legal obligations under the EU Discrimination Directive (2000/78/EC).
7. This was the first case to be brought under the Employment Equality (Age) Regulations 2006.
8. In *UNISON v The First Secretary of State [2006] EWCH 2373 (Admin)* the High Court - in judicial review proceedings - found that the 85 year rule in the LGPS was discriminatory on the grounds of age and that it was not unreasonable for the Government to take the view that it might not be able to defend the 85 year rule for younger employees.

9. The High Court refused UNISON's application for judicial review because the court considered that the Government did have a rational basis for making the decision to remove the 85 year rule.
10. On 15 June 2007 Phil Woolas MP, then Minister for Local Government, announced that there would be statutory consultation on proposals to extend the levels of protection in the LGPS for older employers which was originally introduced by the Local Government Pension Scheme (Amendment) and (Amendment 2) Regulations 2006.
11. The proposal was to provide full, rather than tapered, protection for affected scheme members up to 2020.

The request for information

12. Between August and November 2006 the Appellant corresponded with his MP (Helen Goodman) on the subject of the 85 year rule and on 7 February 2007 he made the following request to her:

"To simplify matters, answers to the following questions would be appreciated:

- i) *As the latest information contains no reference to employer contributions there is a suspicion amongst union members that employers contributions are set to be reduced, please would you clarify what is intended, as it is impossible to consult meaningfully without this information?*

Please would you supply copies of correspondence between the Government and the Local Government Association concerning employer contributions? This is a Freedom of Information request.

- ii) *It is apparent, if the 85 rule falls foul of Age Discrimination Laws, then so must protection based on age rather than length of service. I ask again, please would you confirm whether this is the case?*

Please would you supply copies of the Government Legal advice and all other advice concerning protection is based on age rather than length of service? This is a Freedom of Information Request.

- iii) *Concerning LGPS in Scotland, I understand protection arrangements are superior to those intended for England and Wales. I ask again, please would you confirm whether this is the case and if so please would you explain why the members of the LGPS in Scotland are deserving of a better protection deal than those in England and Wales.*

Please would you supply copies of the Government Legal Advice and all other advice concerning the difference between the protection is intended for Scotland and those intended for England and Wales? This is a Freedom of Information Request.

13. On 19 February 2007 Helen Goodman MP responded to the Appellant stating that she had passed the request to Phil Woolas MP, the relevant Minister, as his was the responsible department involved in negotiations with LGPS and she did not have access to any of the requested documents.
14. In the event the Appellant was dissatisfied with the response he received from the DCLG and requested an internal review on 26 March 2007. The result of this review was not received by the Appellant until 15 January 2009 and then only after the IC reminded the DCLG of its obligations under the legislation.

The complaint to the Information Commissioner

15. On 2 July 2007 the Appellant contacted the IC to complain that he had not received any response from the DCLG to his request for an internal review.
16. On 22 August 2008 the IC contacted the DCLG seeking clarification of why it had refused to provide the information and requesting a copy of the withheld information. The IC asked the DCLG for its arguments relating to section 42 FOIA relating to legal professional privilege. There was no response to this letter and, on 22 January 2009, the IC wrote to the DCLG expressing concern that no response been received and warning that failure to respond within 10 days would result in the issuing of an Information Notice.
17. On 6 February 2009 the IC received an e-mail from DCLG with a copy of a letter explaining its handling of the Appellant's request. It indicated it now wished to rely on section 35 (1) (c) and section 35 (3) FOIA. On 10 February 2009 the IC received copies of the withheld information.

The IC's Analysis

18. The IC's original analysis (and that of the DCLG in respect of its initial position) has been overtaken by events and will not be repeated in any detail.
19. In essence both the IC and the DCLG (when it eventually engaged properly with a request for information) approached the Appellant's request as a request for the legal advice concerning the impact of the Directive on the Rule of 85 itself rather than as a request for the legal advice on the transitional arrangements.

The appeal to the Tribunal

20. The Appellant appealed to the Tribunal on 19 January 2010 and the Additional Party was joined on 1 April 2010.
21. There was then a period of clarification about the particulars and extent of the appeal, something reflected in the volume of material (open and closed) eventually served on the Tribunal and the IC. The Appellant received a considerable quantity of additional material but that did not include the closed material.
22. On 25 June 2010 the DCLG wrote to the Appellant setting out its position in relation to his request as finally clarified and properly interpreted. It refused to disclose the material relying on section 42, section 35 (1) (c) and section 35 (3) FOIA. Additional information not containing legal advice was disclosed.
23. On 13 August 2010 the IC wrote to the Tribunal accepting that section 42 FOIA was engaged and that the public interest in maintaining that exemption outweighed the public interest in disclosure and that the DCLG was entitled under section 35 (3) not to confirm or deny whether it held information relating to the provision of advice by the Law Officers.

The questions for the Tribunal

24. The issues for consideration by the Tribunal:

- (i) Is the closed material – the material sought by the Appellant but not disclosed to him by virtue of section 42 FOIA – the subject of legal professional privilege?
- (ii) If so, is the IC correct in concluding that the public interest in maintaining that exemption outweighs the public interest in disclosure?
- (iii) Is the DCLG entitled to refuse to confirm or deny whether it holds information in the form of the advice from the Law Officers by virtue of section 35 (1) (c)?

Evidence

- 25. The Tribunal read all the open and closed evidence provided by the DCLG.
- 26. It has also considered in detail the points raised by the Appellant. In essence, he believes that reliance on legal professional privilege should not outweigh the public interest test.
- 27. In his view *"this is not some top-secret Iraq abuse enquiry, it is the Local Government Pension Scheme. I believe the public will not be interested in the legal protocol of this matter, however there is likely to be interest in the legality of the Protection Arrangements of the 85 Rule within the LGPS."*
- 28. In his view the claim that the DCLG was exempt from the duty to confirm or deny whether it held the legal information in question should not be permitted because it was claimed late and was also against the spirit of the Freedom of Information Legislation.
- 29. *"It also appears to me that this reliance is rather pointless, as it is already apparent that the information is being withheld, clearly indicating that it does hold information, unless it holds further information which it has not already disclosed to the Commissioner or the Tribunal. Again I contend that the DCLG should not be able to hide behind this legislation because of the nature of the enquiry, that it is the LGPS and not some top-secret issue destined never to see the light of day in 50 years."*
- 30. He points out that as a member of the LGPS *"I do not believe it is unreasonable for me to know whether the protection arrangements*

comply with age discrimination legislation. I have also asked pension administrators this question, however I did not get a response."

The Tribunal's Conclusions

31. The Tribunal has and has had the benefit of being able to see in full the legal advice at the heart of this request.
32. The Tribunal notes that the background to the request was the then Government's decision in 2006 to end the Rule of 85 and create transitional arrangements for existing LGPS members.
33. The Tribunal has read carefully the case of *UNISON v The First Secretary of State [2006] EWCH 2373 (Admin)* in relation to the High Court judicial review proceedings launched by the trade union and rejected by Andrew Nicol QC sitting as a Deputy Judge of the High Court.
34. The High Court in that case considered both the decision to end the Rule of 85 and the transitional provisions that had been made. The trade union's position was that the Government was wrong to consider that the Rule of 85 was incompatible with the United Kingdom's obligations under Council Directive 2000/78/EC on equal treatment in employment.
35. The High Court found that the Government's decision to bring the rule of 85 to an end – and to make transitional provisions in the way that it did – was based quite independently on cost considerations.
36. It is clear from that judgement (at Paragraphs 20 and 22) that the Judge was satisfied that the Government would have reached the decision that it did on both the abolition of the Rule and the transitional provisions on the basis of concerns about costs independent of its view of the impact of the Directive.
37. The High Court concluded that the Government was right to consider that the Rule of 85 was discriminatory on grounds of age (contrary to Articles 1 and 2 (1) (a) of the Directive); that it was right to consider that no relevant derogation applied and that the Government's view that the Rule of 85 could not be objectively justified was a reasonable one for it to take.
38. The Tribunal accepts – in terms of the present appeal – that having had such a careful and detailed analysis in the High Court of the background and lawfulness of the transitional arrangements this is a factor which has to be taken into account when considering whether the interest in maintaining the exemption in section 42 FOIA is outweighed by the public interest in disclosure. The Tribunal also considers that the material it has seen cannot be meaningfully redacted to allow partial disclosure.

39. When the Appellant made his original request in February 2007 he and the public generally had available a High Court judgement on 27 September 2006 that considered in detail and with approval the reasoning behind the then Government's decision to remove the Rule of 85 and to adopt the transitional arrangements proposed.
40. The Appellant, although he has been provided with a great deal of additional material, wants to see the legal advice (the closed material) that relates to this area.
41. The Tribunal has seen and considered the closed material and is satisfied to the required standard – the balance of probabilities – that section 42 is engaged and this closed material is in fact covered by Legal Professional Privilege.
42. The DCLG is not entitled to withhold closed information simply because section 42 FOIA is engaged but the ability of public authorities to obtain full and frank legal advice in situations such as this is a factor that must be considered carefully.
43. At the time the legal advice was being sought and given – and at the time of the original request – there was a risk of litigation and any adverse points made in the advice could then have been deployed against the DCLG.
44. The Tribunal considers that there are no compelling or specific justifications for disclosure of the legal advice, particularly because of the High Court judgement and scrutiny available in terms of the reasoning on the issues in the *Unison* case.
45. It is clear that the Appellant's request would cover information falling within section 35 (1) (c) (the "provision of advice by any of the Law Officers or any request for the provision of such advice").
46. Although the exception was claimed late, the basis for claiming the exemption is obvious and it would not be in the interests of justice to prevent it from being applied.
47. The Tribunal has sympathy with the Appellant's comment that reliance on this exemption is "rather pointless, as it is already apparent that the information is being withheld, clearly indicating that it does hold information". However the Tribunal has to consider the public interest in relation to section 35 (3) and by the narrowest of margins believes it should be maintained.
48. Although the DCLG when it engaged properly in the process has provided the information and material to allow the Tribunal to reach the decision it has, the Tribunal is disturbed by the lack of engagement by

this public body and Government Department throughout most of the period since the original request.

49. It was only when threatened with an Information Notice that it appears to have realised how short it was falling in terms of the requirements to comply with the provisions of the Freedom of Information Act 2000.
50. This kind of laggardly response – if not challenged and noted – is precisely what frustrates the proper operation of information being provided under FOIA or being withheld for reasons which then permit an appeal at the earliest possible opportunity.
51. As a formality the Tribunal sets aside Paragraph 47 of the IC's original decision – dealing with section 42 FOIA – because the "information sought" refers to the incorrect information.
52. The Tribunal finds that the DCLG correctly withheld the closed material now before it in proper reliance on section 42 FOIA and that the DCLG was not subject to a duty to confirm or deny whether it held material within the scope of the request and falling under section 35 (1) (c).
53. Our decision is unanimous.
54. The Tribunal makes no order as to costs in relation to this appeal.
55. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the First – tier Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can be found on the Tribunal's website at www.informationtribunal.gov.uk.

Robin Callender Smith
Tribunal Judge
14 December 2010