



IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000

EA/2014/0296.

B E T W E E N:-

PRADIP BHAVSAR

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE OFFICE OF THE IMMIGRATION SERVICES COMMISSIONER

Second Respondent

Tribunal

**Brian Kennedy QC
Suzanne Cosgrave
Marion Saunders**

Hearing: Fleetbank House on Monday the 18th January 2016.

Subject matter: Freedom of Information Act 2000 generally and also, specifically, whether section 44 applies, and in particular whether section 44(1)(a) is engaged by reason of section 93 of the Immigration and Asylum Act 1999 - prohibited disclosure.

DECISION OF THE FIRST-TIER TRIBUNAL:

The tribunal refuses the appeal.

REASONS

Introduction

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”) generally and also specifically in relation to exemptions claimed under section 44(1)(a).
2. The appeal is against the decision of the Information Commissioner, who is the First Named Respondent, (“**the Commissioner**”) contained in a Decision Notice (“**the Decision Notice**”) dated 29th October 2014 (reference FS50544914).
3. By case management note dated 10 September 2015, it was ordered that the relevant Public Authority, the Office of the Immigration Services Commission (**the “OISC”**) be added to the appeal as a second respondent.
4. The Tribunal Judge and lay members sat on the 18 January 2016 and decided the case after an oral hearing where the Appellant represented himself. The Respondents relied on written submissions previously sent to the Appellant and the Tribunal.

Request by complainant:

5. The complainant wrote to the second respondent on 27 February 2014, with the following request: *“Under the Freedom of Information Act, I would like to be provided with details of the professional indemnity insurance of [a named company which provided immigration services] for the period 2011 – 2014”* (“**the Request**”). The OISC is a statutory entity, which is the regulatory body for entities providing immigration advice or services. The Appellant had complained to the OISC about the named immigration services provider (“**the Provider**”) on 19 November 2013, and had been engaged in related subsequent correspondence.

6. The OISC responded to the Request on 14 March 2014. It refused to release the information to the Appellant on the basis that “*section 93 of the Immigration and Asylum Act 1999 prevents me from disclosing to you information that was obtained in the course of the Commissioner’s regulatory function ... unless it can be released in accordance with one of the exemptions to that provision within the Immigration and Asylum Act*”. The OISC’s position was that no exemption had been satisfied and release of the information was not therefore permitted.
7. The appellant wrote to complain about this decision on 14 May 2014. He explained that, in his view, the Provider had caused financial loss and that he wished to make a claim against the provider’s insurer in respect of that loss. The OISC treated the complaint as a request for an internal review, and responded on 5 June 2014 reaffirming its previous decision.
8. On 16 June 2014 the Appellant complained to the Commissioner, who investigated the complaint. During the course of the investigation the OISC indicated that it would rely on section 44 (1)(A) of FOIA in respect of the complaint.

The Commissioner’s Decision:

The Commissioner served a Decision Notice dated 29 October 2014. He upheld the OISC’s reliance on section 44 (1)(a) of FOIA, which states;

“(1) *Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*

(a) is prohibited by or under any enactment, ...”

9. The Commissioner noted that the effect of that legislation was that: “*if another piece of legislation means that the OISC would be breaking the law if it provided the insurance policy, the OISC can refuse the request*”. (DN/9). He went on to consider the enactment relied on by the OISC,

namely section 93 Immigration and Asylum Act 1999 (“I&AA”) and set out the details of the restrictions falling within the I&AA.

10. The OISC had explained the professional indemnity insurance was a mandatory requirement for immigration service providers, and was a condition precedent to such providers being granted an authorisation to practise (DN/12). The Provider’s insurance had been provided to the OISC in order to obtain that authorisation to practise, hence in order for the OISC to carry out its functions.
11. On analysis, the Commissioner considered that the insurance policy both related to and identified the Provider and the individual who was the proprietor of the Provider. The OISC had informed the Commissioner that the information was not publicly accessible. Accordingly, in the Commissioner’s view section 93 (2) was satisfied (DN/13). The OISC had considered the exemptions in section 93 (3) and informed the Commissioner that none of the qualified exemptions (qualified by the overriding public interest test) were satisfied and the disclosure was not necessary in the public interest. The Commissioner understood from this that none of the exemptions were satisfied. In particular, the fulfillment of section 93 (3)(d) was a matter for the OISC, into which the Commissioner could not enquire (*our emphasis*) (DN/14 -15).
12. Nor could section 93(3)(c) be satisfied. While the Commissioner was aware that the Appellant was in dispute with the Provider, it was not necessary to obtain the details of the insurance company from the OISC in order to make a claim against the Provider. A professional indemnity insurance policy was not an instrument against which a third party could claim: rather, it was intended to protect the professional adviser by providing cover to protect them from any legal costs incurred in defending claims brought against them (DN/16). Accordingly the statutory prohibitions under section 93 I&AA was correctly claimed (DN/17).

Grounds of appeal:

13. The Commissioner, properly, in our view, identifies two grounds of Appeal as follows;
 - a) The purpose of professional indemnity insurance is to protect the public from the negligence of professional firms. Accordingly, where a professional firm has closed it is necessary for the regulator to provide the details of the policy: otherwise, the public would not be able to make claims against the insurance companies.
 - b) The OISC has a duty to act in the public interest, and accordingly should have provided the information under section 93(3)(d) of I&AA.

The Respondents Response to the Grounds of Appeal:

14. The Commissioner has considered the question of whether statutory prohibition bars disclosure as being a question of statutory construction and referred to the helpful decision in the case of Ofcom V Morrissey and ICO [2011] UKUT 116 (AAC) at [63]:
15. The Commissioner observes, where the application of the statutory prohibition involves an element of judgment or discretion on the part of the public authority, the question for the Commissioner, or the Tribunal is not whether that judgment or discretion has been correctly exercised. Referring to the Upper Tribunal in Morrissey where it determined, "*the role of the Commissioner, and thereafter of the Tribunal if appropriate, is limited to a verification process.*" (at [58]), and if the statute requires: "*an exercise of judgment, then it is not the role of the Commissioner to tell a public authority that under the relevant prohibition it should have reached a different conclusion*" (at [60]). The same point was made by the Information Tribunal in Slann V IC EA/2005/0019 AT [36] : - "*there appears to be no legal basis to entertain challenge the exercise of any discretion.*"

16. In constructing a statutory prohibition, the fact that FOIA might otherwise permit disclosure is to be ignored; Dey V IC EA/2006/0057 at [18 - 21], and Slann at [38].
17. The Commissioner performs a careful analysis of the above rationale at paragraphs 15 – 24 of his formal Response (“ICR”), dated 22 December 2014, to the Grounds of Appeal, both before this Tribunal. The Tribunal finds that the Appellant has failed to persuade us that the Commissioner erred in his reasoning or analysis in the DN and we accept and adopt his Response, the ICR, dated 22 December 2014.
18. The OISC have also provided us with a Response (dated 14 October 2015) to the Grounds of Appeal and further points raised by the Appellant in his skeleton argument of 5 September 2015 (subsequent to the ICR). They too accept and adopt the Commissioner’s reasoning and conclusions and add some important factors to which we will allude and with which we agree.
 - a)They argue that the Appellant’s argument as to Public Interest in disclosure is premised on some cause of action lying against the insurer. In fact, as they point out any potential cause of action is not against the insurer but against the Provider. We also agree with their submission that a matter of private interest between two parties does not constitute a matter of public interest sufficient to outweigh the OISC’s duty of confidence and we note that at the time of the request and indeed the time of this appeal, no civil proceedings had been commenced.
 - b) The Appellant has raised the Third Party (Rights Against Insurers) Act 2010 and the Insurance Act 2015 but neither were pertinent or alive at the time of the request or indeed this appeal.
 - c) It is noted and we accept, that the purpose of section 93 I & AA is not, as the Appellant argues, to protect the public in their dealings with Immigration advisors. The general duty of the OISC is to promote good practice by those

who provide Immigration advice or services . The plain purpose of section 93 I&AA is to protect, under threat of criminal sanction, the confidentiality of material provided under compulsion by Immigration advisors to the OISC.

19. The Tribunal accept and find that for the section 93(3)(d) of the I & AA to require the OISC to apply the public interest balance test, in such a way as to require the OISC to disclose confidential information, such as the disputed information herein, where the material had been sought for the purpose of pursuing a private action and, furthermore, where the material may not be capable of assisting that action, or otherwise can be sought from a civil court dealing with such a private action, would be contrary to common sense.
20. FOIA is not the correct vehicle for the Appellants quest. He has now commenced a civil action and such disclosure or discovery as he seeks can and should be sought in the forum of that civil court.
- 21.
22. Accordingly, and for the reasons given above, this Tribunal finds that the Appellant has failed to persuade us that the Commissioner erred in the analysis and reasoning in his DN.

Conclusion:

23. In light of the foregoing, the Tribunal refuses this appeal.
24. The Tribunal sat on 16 April 2015 to hear this appeal when the Appellant was represented by Anne Heller of counsel who sought time to give advice to the Appellant on proceeding with the appeal. The matter was adjourned and later heard from Fritz Koodagoda of counsel who sought an adjournment as he had only just received instructions and required time to prepare. Once again the appeal was adjourned but this time

peremptorily until 18 January 2016 by which time the Appellant was not represented. He was advised by this Tribunal to seek advice or assistance on his potential civil legal proceedings.

Brian Kennedy QC

Tribunal Chairman

DATE: 25 January 2016.