



## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Dated 20 July 2006**

**Public Authority: Treasury Solicitors ("TSOL")**

**Address: One Kemble Street  
London  
WC2B 4TS**

### **Summary Decision and Action Required**

**The Commissioner's decision in this matter is that the public authority has dealt with the Complainant's request in accordance with Part I of the Act**

#### **1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner**

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

#### **2. The Complaint**

2.1 The Complainant has advised that on 2 February 2005 the following information was requested from the Treasury Solicitors ("TSOL") in accordance with section 1 of the Act.

*“access to information of the files and records [relating to him and] held by the Law Officers, and papers generated:*

- (a) in the period 1 July 1998 – December 2000,*
- (b) between the Attorney General and any other third party, and*
- (c) in the prospective and actual proceedings brought against him under section 42 of the Supreme Court Act 1981.*

2.2 In another letter to TSOL dated 4 March 2005, the Complainant further clarified his request by stating that the documents he particularly sought were all communications from:

- “(a) ...Digby Jones, then of the law firm of Edge and Ellison...in the period September 1999 to December 1999; and*
- (b) the partners of the firm of Kingsley Napley in the period September 1999 to May 2000.”*

2.3 TSOL has in its Refusal Notice dated 2 March 2005 (and reproduced on 30 March 2005), cited the following exemptions under the Act:

- (a) section 30(2) – Investigations and proceedings conducted by public authorities,*
- (b) section 31 (1) (g) – Law enforcement, and*
- (c) section 42 – Legal professional privilege.*

2.4 TSOL’s decision to withhold the information requested by the Complainant was upheld by an internal review, and confirmed to the Complainant in a letter dated 27 May 2005. The Complainant was also informed that TSOL had found correspondence with *“Kingsley Napley and also with another eight firms of solicitors, including Beachcroft Wansbroughs, about the numerous actions that you [the complainant] had brought and which ultimately lead to you being declared a vexatious litigant. I can still find no correspondence with Edge Ellison although they were referred to by name in correspondence from other solicitors. This is not to say that such correspondence may not come to light in the future.”*

2.5 The Complainant was dissatisfied with the result of the internal review and made a request to the Commissioner to investigate the validity of the public authority’s decision to refuse him access to the information he requested.

### **3. Relevant Statutory Obligations under the Act**

**Section 1(1)** provides that –

*“Any person making a request for information to a public authority is entitled –*

(a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

(b) *if that is the case, to have that information communicated to him.”*

#### **4. Review of the case**

##### **4.1 Background**

The Complainant had alleged that he had suffered financial loss as a result of a colossal fraud. In an attempt to seek recompense, he initiated numerous legal actions against parties that he believed were either parties to the fraud or impediments to his desire to seek recompense. As a result of the numerous (and unsuccessful) legal actions brought by the complainant, the High Court made a civil proceedings order (“CPO”) against the Complainant on 15 February 2000 under section 42 of the Supreme Court Act 1981 (“S 42 SCA”), and he was declared a vexatious litigant.

S 42 SCA provides that:

*“If on an application made by the Attorney General under this section, the High Court is reasonably satisfied that any person has habitually and persistently and without reasonable ground instituted vexatious civil proceedings...in the High Court, and whether against the same person or different persons...the court may after hearing that person or giving him an opportunity of being heard, make a civil proceedings order.”*

The complainant has continued to allege that there is a conspiracy against him to prevent proper investigation of the alleged fraud committed against him. He has also complained to the Serious Fraud Office who refused to investigate his matter further.

##### **4.2 Scope of the review**

The complainant requested the Commissioner to consider whether or not the requested information that he sought had been correctly refused under section 1(1) of the Act. In his request, the complainant has also asked the Commissioner to consider the issues of the conspiracy to defraud him and the conspiracy to prevent him from seeking redress from the alleged fraudsters.

On 10 November 2005, the Commissioner informed the Complainant that the scope of his authority was limited to the investigation of complaints about a public authority’s refusal to provide access to information that has been requested by an individual. The Complainant was further informed that in the event it is determined that he had been incorrectly refused access to information, the Commissioner would issue a Decision Notice for the information to be released to him by the public authority.

4.3 The Commissioner made a request to TSOL to be provided with a copy of the information listed in section 2.1 and 2.2 (above). This information was contained in 10 lever arch files consisting of the following:

- (i) letters from the complainant to other third parties;
- (ii) correspondence between TSOL and the complainant;
- (iii) court papers (such as pleadings, affidavits, judicial decisions etc) which have been served by and on the complainant; and
- (iv) letters and information from law firms or other third parties relating to the complainant and the S 42 SCA proceedings.

In a telephone conversation with the Commissioner's office on 10 January 2006, the complainant confirmed that he was only interested in the documents contained in (iv) above (hereinafter referred to as the "*requested information*") and not in the documents contained in (i) to (iii).

4.4 The Commissioner also requested that TSOL demonstrate and justify the application of the exemptions in sections 30 and 31 of the Act; and the decision that it is in the public interest to withhold the requested information from the Complainant.

4.5 In order to establish whether TSOL have correctly withheld the requested information, there are two issues to be determined by the Commissioner. The first is whether the utilised exemptions have been validly applied. The second question – which only arises if the first question is answered in the affirmative – is whether it is in the public interest to withhold or release the requested information.

4.6 For the purposes of clarity, the Commissioner has further categorised the requested information into:

- (i) *Discreet Information* i.e. information from third parties that TSOL assert are confidential sources under section 30(2)(b);
- (ii) *Official Information*, i.e. information from non-confidential sources, which TSOL has described as "*internal communications and correspondence between the Attorney General's office and the Treasury Solicitor's department*"; and
- (iii) *Advice Information*, i.e. communications with, and advice from, counsel instructed in the investigation and subsequent proceedings brought against the Complainant under S42 SCA, and other related communications between the Law Officers and TSOL.

## 5. The Commissioner's Decision

5.1 After an evaluation by the Commissioner of: the information on the file; submissions received from both parties; and the relevant sections of the Act, the

Commissioner's decision in this matter is that the public authority has dealt with the Complainant's request in accordance with the requirements of Part I of the Act for the reasons set out below.

*Applicability of the utilised exemptions*

5.2 Section 30 (2) of the Act states that:

*"Information held by a public authority is exempt information if*

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to –*
- (iii) investigations...which are conducted by the authority for any of the purposes specified in section 31(2)...or by virtue of powers conferred by or under any enactment, or*
- (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and*
- (b) it relates to the obtaining of information from confidential sources."*

5.3 Section 31(2) (c) states that information is exempt if its disclosure would be likely to prejudice the purpose of *"ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise."*

5.4 TSOL assert that the requested information is exempt from disclosure because it was obtained for the purposes of carrying out its functions and it relates to civil proceedings and/or investigations pursuant to section 30(2)(a)(iii) and (iv) of the Act.

5.5 In his letter to the Commissioner dated 29 March 2005, the Complainant argues that the application of this section to the requested information is invalid because the 'sources' that provided the *Discreet Information* are known to him and are therefore not confidential.

It is the Commissioner's view that the Complainant's claimed knowledge of the identity of the confidential sources of the *Discreet Information* is not relevant to the application of section 30 (2) as the decision needs to be whether or not the information could be deemed to be in the knowledge of a significant part of the public and therefore in the public domain.

The Commissioner notes that the CPO refers to a number of the actions that the complainant was involved in, and as such, he could perhaps deduce that complaints had been received from the counterparties or their solicitors in connection with these actions. The judgment ( given by Lord Bingham and Mr Justice Klevan) expressly refers to actions involving - Kingsley Napley - as well as certain other cases in which other complainants were representing counterparties to the Complainant's actions and it may have been obvious to the

Complainant that these long-running ‘*adversaries*’ to his frequent litigation would have been the sources of the Discreet Information.

However, review of the files submitted by TSOL also reveals the existence of correspondence from other informants whom might not have been deduced as they were not referred to in court nor were their actions mentioned publicly. Given the number of legal actions previously initiated by the Complainant it is not unexpected that there are other informants who would want to complain or contribute to any investigation relating to the S42 SCA proceedings. Therefore, the Commissioner is satisfied that it may not be as easy as one might think for the complainant to deduce the identity of all the informants.

In any event, it is the Commissioner’s decision that even if the complainant may be able to deduce the sources of the Discreet Information, this would not mean that their identity is no longer confidential as it may not be so easily deduced by other members of the public and therefore could not be considered to be in the public domain. Similarly, nor would it necessarily justify disclosing it to the world at large.

- 5.6 The Complainant also asserts that the Attorney General’s (“A-G”) investigation is not a relevant investigation for the purposes of section 30(2) of the Act. In his letter to the Commissioner dated 29 March 2005, the Complainant states that “... *there is plainly a distinction between government law officers seeking to establish whether or not a party has been involved in a criminal act...although fraud is per se a criminal act [he] was engaged in a resolution in the civil courts.*”

In response to the above statement, the Commissioner would like to explain that the exemption in section 30 of the Act is divided into two parts. The information covered by the first part is concerned with particular criminal investigations, and the second part is concerned more broadly with information held in relation to more general investigatory functions which depend or relate to the obtaining of information from confidential sources. These investigations would also include civil proceedings brought by or on behalf of a public authority arising from an investigation which the authority has a duty or power to conduct i.e. where the investigation may lead to civil rather than criminal proceedings.

- 5.7 Having considered the above comments, reviewed the information on the file relating to the S 42 SCA proceedings, and the relevant statutory provisions, the Commissioner is satisfied that section 30(2) is applicable to the Discreet Information because it is related to the investigation and assessment of the viability of initiating the S 42 SCA proceedings against the complainant – investigations which fall within section 31(2)(c) of the Act; and it has been provided by confidential sources as required by section 30(2)(b) of the Act.

In addition, this exemption is “*class based*” therefore it is not necessary to be able to point to some harm or prejudice that may arise as a result of disclosure.

*Public Interest Test*

- 5.8 Section 30 is also a qualified exemption and the public interest test therefore needs to be considered.

Due to the fact that the same public interest considerations are also applicable to TSOL's use of the exemption in section 31(1)(g), the Commissioner provides substantive comments in paragraphs 5.16 to 5.22 below.

*Section 31(1) (g) of the Act.*

- 5.9 TSOL has applied this exemption to the *Official Information* (i.e. where and to the extent that section 30 did not apply). TSOL assert that the exemption under section 31(1)(g) applies because the disclosure of the information would be likely to prejudice the exercise of its regulatory functions under section 31(2)(c) of the Act.
- 5.10 In their letter of 22 December 2005, TSOL maintain that by virtue of S 42 SCA, the A-G possesses the exclusive statutory power to regulate the conduct of vexatious litigants, and this statutory power is fundamental to A-G's remit *'to ensure proper and effective access to the courts by members of the public who have a legitimate claim upon the courts' time and resources'*.
- 5.11 Having considered the above comments, and reviewed the statutory provision cited, the Commissioner is satisfied with TSOL's explanations relating to the regulatory powers of the A-G.
- 5.12 TSOL also informed the Commissioner that the Official Information relates to the investigations carried out prior to the commencement of the S 42 SCA proceedings against the Complainant. These investigations are confidential in nature. Therefore it is their contention that disclosing this information would prejudice, or be likely to prejudice the regulatory process and the decision whether regulatory action was justified and should be taken.
- 5.13 The Commissioner notes from the information widely available (e.g. [www.tsol.gov.uk/Publication/scheme](http://www.tsol.gov.uk/Publication/scheme) and [www.gls.gov.uk.about.departments](http://www.gls.gov.uk.about.departments)) that members of the public or their solicitors ("the Applicant") can complain against an alleged vexatious litigant by making an application to the Attorney General to bring a S 42 SCA proceeding.

The Commissioner is satisfied that the often emotive background context of these applications, and serious consequences of being declared a vexatious litigant makes it important to conduct the S 42 SCA investigations in a confidential manner. This umbrella of confidentiality provides the A-G with an important 'working space' free from any distractions to conduct thorough investigations. This working space would also enable the A-G receive full and frank advice to enable him form a well informed view on the merits of a complaint from the Applicants.

- 5.14 Therefore it is the Commissioner's view that disclosure of the Official Information would prejudice the effective performance of the A-G regulatory obligations

under S 42 SCA; and that subject to the public interest test, TSOL has correctly applied section 31(1) (g) of the Act to the Complainant's request.

- 5.15 Section 31 is also a qualified exemption and the public interest test therefore needs to be considered.

### **The Public Interest Test applicable to sections 30 (2) and 3(1)(g) of the Act**

- 5.16 TSOL acknowledges that it can be argued that the disclosure of the Discreet Information and Official Information is in the public interest because it will result in greater knowledge of the processes leading up to the court issuing a CPO under s42 SCA, and in greater transparency.

- 5.17 However, TSOL also provided the following arguments against disclosure:

- (i) Disclosure of the Discreet Information would prejudice future section 42 SCA proceedings because it would undermine its confidentiality;
- (ii) Disclosure of the Discreet Information would likely discourage Applicants from bringing the activities of vexatious litigants to the attention of the A-G, which would prejudice and inhibit the ability of the A-G to investigate and commence such proceedings in court; and
- (iii) Disclosure of the Official Information would undermine confidence in the confidentiality and integrity of the process.

- 5.18 In deciding that the public interest in withholding the requested information overrides the public interest in disclosure, TSOL also state that it has taken into account the need to protect Applicants from harassment in the form of further vexatious claims or exchange of correspondence from vexatious litigants.

### **The Commissioner's assessment of the Public Interest**

- 5.19 The Commissioner accepts that there is a public interest argument in support of disclosure as described above. In addition, the Commissioner considers that disclosure of the requested information may also further the public's understanding of, and participation in, vexatious litigation issues; and the role of the A-G in dealing with complaints from Applicants.

- 5.20 Notwithstanding the above arguments, it is the Commissioner's view that the public interest in withholding the Official and Discreet Information overrides the public interest in disclosure.

- 5.21 The Commissioner has reached this position for the following reasons:

- (i) The Commissioner is satisfied that it is in the greater public interest that the court system is protected from being abused by litigants who persist in bringing or initiating unmerited court actions because deploying judicial resources to dealing with vexatious litigants would result in the court system being congested. This congestion would result in delays, increased



costs in public funds, time inefficiency and hinder the public's right of access to an efficient judicial system;

- (ii) The Commissioner is also aware of the stress, unnecessary expense and trouble borne by counterparties to vexatious litigation, especially when there is little or no hope of recovering adequate recompense by the way of costs because most vexatious litigants may conduct their legal actions as '*Litigants in Person*'; and
- (iii) In addition, and for the reasons stated in paragraph 5.13 above, the Commissioner is satisfied that disclosure of all the information provided by Applicants would severely handicap the A-G's ability to perform his statutory (and exclusive) mandate to investigate complaints under S 42 SCA because it may discourage these Applicants from making S 42 SCA representations to the A-G because of the potential for further harassment and vexatious litigation.

Therefore, there is a strong public interest in allowing solicitors and Applicants to continue to make such representations to the A-G without such representations being disclosed.

- 5.22 The paramount factor in the Commissioner's decision on where the public interest lies is his examination of the issue of transparency because of: the confidentiality of the S 42 SCA investigation process; and its effect on the Complainant's own fundamental rights of access to the legal system.

From his review of the information on the file (including the judgment in the S 42 SCA proceedings brought against the complainant) the Commissioner is confident that the S 42 SCA order does not prohibit a vexatious litigant from exercising his right to continue or commence civil proceedings ("litigant rights"). Instead the S 42 SCA order acts as a '*sieve*', in which the litigant's right is conditional on obtaining the permission of the High Court to exercise the right. To obtain this permission, the court must be satisfied that the proceedings or application are not an abuse of the court process, and that there are reasonable grounds for the proceedings or applications.

The Commissioner's confidence is reaffirmed by the Court of Appeal decisions on this issue especially in *Ebert -v- Official Receiver* (2001) EWCA where the court accepted that the S 42 SCA process was a justified restriction of the vexatious litigant's right of access to the court.

In addition, after a perusal of the requested information and the CPO issued against the Complainant, the Commissioner is re-assured that the Complainant has been provided with the opportunity to answer the case against him based on the representations and information in open court, and has not been prejudiced by lack of access to the information.

#### *Section 42 of the Act*

- 5.23 Section 42 (1) of the Act states:

*“Information in respect of which a claim to legal professional privilege or...to confidentiality of communications could be maintained in legal proceedings is exempt information.”*

- 5.24 TSOL contends that communication with and advice from counsel relating to the S 42 SCA investigation; and communications between the Law Officers and TSOL are exempt because of legal professional privilege.

This exemption is “*class based*” therefore it is not necessary to be able to point to some harm or prejudice that may arise as a result of disclosure. However, TSOL states that disclosure of this information ‘*would prejudice the investigation and undermine the ability to obtain full and frank advice*’.

- 5.25 After a review of the above documents, the Commissioner is satisfied that the Advice Information is subject to legal professional privilege for the following reasons:

- (i) The Advice Information was pursuant to the investigation which led to the S 42 SCA proceedings in the High Court, and resulted in the CPO against the complainant
- (ii) The dominant purpose of the Advice Information was to enable the A-G decide the merits of making a S 42 SCA application before the High Court; and
- (iii) At the time the Advice Information was produced there was a reasonable prospect that the S 42 SCA application would be made in court.

### **The public interest test**

- 5.26 Information which is subject to legal professional privilege is exempt from disclosure if the public interest in withholding the privileged information overrides the public interest in disclosure.

- 5.27 The public interest in disclosing the Advice Information lies in creating accountability and transparency in actions and decisions being taken by TSOL.

In addition the Commissioner also considers that disclosure of the Advice Information may further the public’s understanding of, and participation in vexatious litigation issues and the role of the A-G in dealing with complaints from Applicants.

However, balanced against the arguments for disclosure is the public interest in maintaining the exemption for information subject to legal professional privilege.

The concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisors after having full and frank discussions. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.

The Information Tribunal in its decision in Bellamy v Information Commissioner (appeal no. EA/2005/0023, FS0066313) stated in paragraph 35 that “...*there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest...It may well be that...where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight...Nonetheless, it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case.*

- 5.28 In the Commissioner’s view the very serious consequences of a CPO makes it imperative for the A-G to receive confidential and candid advice and engage in full and frank discussions to facilitate the decision on whether or not to make an application under S 42 SCA. The Commissioner’s investigation of (and the background context) of this complaint strongly indicate that the Advice Information is currently not ‘*stale*’.
- 5.29 Therefore the Commissioner is satisfied that in the particular circumstances of this case, the public interest in withholding the Advice Information overrides the public interest in disclosure.

## **6. Action Required**

The Commissioner does not require TSOL to take further action with relation to this complaint

## **7. Right of Appeal**

- 7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the “Tribunal”). Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

- 7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Reference: FAC50070211

**Dated the 20th day of July 2006**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**