

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 April 2008

Public Authority: The Scotland Office
Address: Dover House
Whitehall
London
SW1A 2AU

Summary

The complainant made two requests to the Office of the Advocate General for Scotland (part of the Scotland Office) for legal advice the Advocate General and his office may have produced in relation to legal proceedings which he was a party to. The public authority refused to confirm or deny whether it held the legal advice specified in the first request under section 42 of the Act. It refused to confirm or deny whether it held the legal advice specified in the second request under sections 35 and 42 of the Act. During the course of the investigation the public authority informed the Commissioner that, in respect of the first request, it was no longer refusing to confirm or deny whether it held the legal advice. It confirmed that it held the advice but refused to disclose the content under section 42 of the Act. In respect of the second request it informed the Commissioner that it no longer wished to rely on section 42 but was continuing to rely on section 35 in support of its decision to refuse to confirm or deny. Having investigated the complaint the Commissioner has found that the information specified in the first request was exempt under section 42 of the Act and the public interest favoured maintaining the exemption but that the public authority breached section (1)(1)(a) of the Act by failing to confirm or deny to the complainant if the information was held. In respect of the second request the Commissioner found that section 35 was engaged and the public interest favoured maintaining the exclusion of the duty to confirm or deny.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made two requests for information to the public authority for legal advice which the Advocate General for Scotland or his office, may have given to the Driving Standards Agency (DSA) in relation to legal proceedings to which both the complainant and the DSA were parties.
3. The complainant made his first request on 18 September 2006 in which he asked the public authority to provide him with any legal advice the Office of the Advocate General for Scotland may have provided to the DSA regarding a claim he had made for loss of earnings against the DSA.
4. The complainant sent a second request to the public authority on 2 October 2006 when he asked for legal advice the Advocate General for Scotland may have given to the DSA regarding a claim he had made for loss of earnings against the DSA. The public authority has confirmed that it interpreted this as a new request for advice the Advocate General for Scotland himself, rather than his office, may have provided.
5. The public authority responded to both requests on 12 October 2006. In response to the first request it said that it was refusing to confirm or deny whether it held any legal advice under section 42 of the Act which it explained provides for an exemption from the duty to confirm or deny if to do so would involve the disclosure of information to which a claim for legal professional privilege could be maintained in legal proceedings. It said that it believed that the public interest in maintaining the exclusion of the duty to confirm or deny whether it holds the requested information outweighs the public interest in disclosing whether it holds the requested information.
6. In response to the second request the public authority said that it was refusing to confirm or deny whether the requested information was held under section 42 and section 35 of the Act. Again it said that in respect of both exemptions it believed that the public interest in maintaining the exclusion of the duty to confirm or deny whether it holds the requested information outweighs the public interest in disclosing whether it holds the requested information.
7. The complainant requested an internal review of the public authority's decision to deal with his request under the Act rather than the Freedom of Information (Scotland) Act 2002, ("the Scottish Act").
8. The public authority presented the findings of its internal review on 8 November 2006. It said that it was satisfied that the complaint had been dealt with under the correct legislation and within the correct timescale.

The Investigation

Scope of the case

9. On 20 November 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse to comply with his two requests of 18 September 2006 and 2 October 2006.

Chronology

10. The Commissioner wrote to the public authority on 29 October 2007 and informed him of the details of the complaint. The Commissioner noted that for both requests the public authority had refused to confirm or deny whether it held the information under section 42 of the Act. The Commissioner asked the public authority to explain why confirming or denying that it held the requested information would, in itself, involve the disclosure of information in respect of which a claim to legal professional privilege or confidentiality of communications could be maintained in legal proceedings.
11. The Commissioner also invited the public authority to provide him with any further representations in support of its decision to refuse the complainant's two requests.
12. The public authority responded to the Commissioner on 9 January 2008. In respect of the first request of 18 September 2006 the public authority said that it no longer wished to rely on section 42(2) of the Act to refuse to confirm or deny whether it held the information. It said that it could now confirm that it holds information of the description specified in the complainant's first request. However, it said that it considered the content of the advice to be exempt information under section 42(1) of the Act since it is legal advice given by a solicitor to a client, in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. It said that it believed that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in this instance and provided the Commissioner with its arguments as to why it believed that this was the case.
13. In respect of the second request of 2 October 2006 the public authority said that it no longer wished to rely on section 42(2) of the Act to refuse to confirm or deny whether it held the requested information. However, it said that it would continue to refuse to confirm or deny whether the information was held under section 35(1)(c) (read with 35(3) of the Act). It said that it believed that the public interest in maintaining the exclusion of the duty to confirm or deny whether the information is held under section 35(3) outweighs the public interest in confirming or denying whether the information is held.
14. On 25 January 2008 the Commissioner contacted the public authority to ask that it provide him with a copy of the information it had withheld in response to the first

request. The Commissioner also asked the public authority to respond to the following questions regarding the legal advice it was withholding in response to the first request:

- Why was the advice sought and what was the advice used for?
 - Was the fact that advice was requested/received ever made public?
 - Was the content of the advice disclosed in any way?
 - Was any action taken on the basis of the advice?
 - If so, was the fact that action was taken on the basis of legal advice ever made public?
15. The public authority responded to the Commissioner on 5 February 2008 when it provided him with a copy of the withheld information. It provided some background to the context in which the legal advice (from the office of the Advocate General for Scotland) had been given and also provided answers to the Commissioner's questions.

Findings of fact

16. The Advocate General for Scotland is a UK Law Officer.
17. The complainant and the DSA were parties to legal proceedings in 2006. The complainant had appealed to the Court of Session about a decision of the Transport Tribunal to disqualify him as a driving instructor. The Office of the Advocate General acted on behalf of the DSA in the Court of Session Appeal. The complainant lost his appeal and was ordered by the Court to pay the DSA's legal expenses.
18. The complainant had asserted that he had a claim against the DSA for loss of earnings and had suggested that a sum of £2000 should be offset from the costs he had been ordered to pay by the Court of Session.
19. The public authority has now confirmed that it holds information falling within the scope of the first request. The information is legal advice from the Office of the Advocate General for Scotland to the DSA.
20. The public authority has said that as of 5 February 2008 the complainant has yet to settle the costs ordered by the Court.
21. There is a long standing convention that neither the fact that the Law Officers have been consulted in relation to a particular matter, nor the substance of any advice they may have been given is disclosed outside Government. This convention is recognised in paragraph 24 of the Ministerial Code which states that:

“The fact that the Law Officers have advised or have not advised and the content of the advice must not be disclosed outside Government without their authority.”

Analysis

22. A full text of the relevant statutes referred to in this section is contained within the legal annex.

First Request

Procedural Matters

23. Section 1(1)(a) of the Act provides that a public authority must confirm or deny whether it holds information specified in a request, unless Part II of the Act provides an exemption from this duty. In its response to the complainant's first request the public authority initially refused to confirm or deny if it held any information under section 42(2) of the Act. The public authority upheld its decision to do so at the internal review stage. However, during the course of the Commissioner's investigation the public authority informed the Commissioner that it no longer wished to rely on section 42(2) of the Act and was now willing to confirm that it held information falling within the scope of the complainant's first request. It maintained that it believed that the information itself was exempt from disclosure under section 42 of the Act.
24. Whilst the public authority informed the Commissioner that it held the information, this was not communicated to the complainant. The Commissioner considers this a breach of section 1(1)(a) of the Act. It follows that the public authority has also breached section 17(1) of the Act by failing to inform the complainant why the information is to be withheld.

Section 42 – Legal Professional Privilege / Confidentiality of Communications

25. The public authority has said that it is now willing to confirm that it holds legal advice of the description specified in the complainant's first request. However, it is withholding the content of the legal advice under section 42 of the Act. Section 42 provides for an exemption for information to which a claim for legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings. Whilst the Commissioner is considering whether a claim to confidentiality of communications could arise the principles involved are interchangeable with those of legal professional privilege.
26. Legal professional privilege is a common law concept designed to protect the confidential relationship between a legal advisor and client. In *Bellamy v The Information Commissioner and the DTI* the Information Tribunal described legal professional privilege as:

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and

his, or hers or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.”

27. Information will attract privilege where it constitutes legal advice between a legal advisor and a client in a professional capacity and is held for the dominant purpose of providing legal advice. There are two types of legal professional privilege. Legal advice privilege can be claimed where no litigation is contemplated or pending. Litigation privilege can be claimed where litigation is contemplated or pending.
28. The Commissioner has reviewed the content of the legal advice and is satisfied that it is legal advice to which a claim for litigation privilege could be maintained. The legal advice is from a legal advisor to a client in a professional capacity. The information was created in response to the complainant's claim of loss of earnings against the DSA and is held for the dominant purpose of providing legal advice.
29. It is noted that confidentiality can be waived where the party which owns the information decides to waive the privilege. Waiver of legal profession privilege occurs where permission is given to make the information available to a third party without restriction or where the information is treated in such a way that it can be implied from that action that privilege has been waived. The public authority has confirmed that the content of the legal advice was never disclosed in any way and the Commissioner has seen nothing to suggest that privilege has been waived in this case.
30. The Commissioner is of the view that the legal advice held by the public authority is information to which a claim for confidentiality of communications could be maintained in Scotland. This is because the legal advice was produced in the context of ongoing litigation between the complainant and the Driving Standards Agency that was being heard in the Court of Session, part of the Scottish legal system. The Commissioner is satisfied that the exemption in section 42 of the Act is engaged in this case.

Public Interest Test

31. Section 42 of the Act is a qualified exemption and therefore the Commissioner has undertaken an assessment of the public interest test. This is set out in section 2(2)(b) of the Act which states that the obligation to disclose information does not arise if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
32. The public authority has said that there is a strong public interest inherent in legal professional privilege/confidentiality of communications. It has argued that the concept exists in order for clients to be able to seek comprehensive and frank legal advice and have confidence that the advice is given freely without the consideration of its wider disclosure.

33. The Commissioner agrees with the public authority that there is a strong public interest in protecting the confidentiality of exchanges between a legal advisor and client and in ensuring that clients obtain legal advice that has been provided in the expectation that it will remain confidential. The Commissioner believes that there is a strong element of public interest inbuilt in legal professional privilege and notes the comments of the Information Tribunal in *Bellamy v The Information Commissioner and the DTI* in this regard. In this case the Information Tribunal noted 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 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 cut case...”*
34. In that case legal professional privilege was described as “a fundamental condition” of justice and “a fundamental human right”.
35. The Commissioner recognises that the public interest in maintaining the exemption would be somewhat diminished in cases where the legal advice can be said to be “stale”. The public authority has addressed this point in its submission to Commissioner and has pointed to the fact that the complainant may still be within time to present a claim in respect of his alleged loss of earnings and has not yet completed his payment of costs in relation to the case heard at the Court of Session. The public authority has argued that in light of this fact the legal advice cannot be considered stale and the Commissioner agrees with this assessment.
36. In *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* the Information Tribunal decided that the public interest in maintaining legal professional privilege will be stronger in cases where legal advice is live or recent. Live advice is advice that is still being implemented or relied upon. Given that the complainant may still be within time to present a claim in respect of his alleged loss of earnings the Commissioner is satisfied that the advice in this case can still be considered live. The Information Tribunal declined to agree on a benchmark for when legal advice can be considered ‘recent’ but the Commissioner feels that it is reasonable to conclude that legal advice produced in 2006 can be considered recent advice.
37. The Commissioner accepts that there is a public interest in disclosure as it would serve to promote the accountability of decisions made by the Driving Standards Agency and the Commissioner considers this to be in the public interest. It would serve to increase transparency in the work of the public authority and it would help the public better understand how decisions that affect them are made.
38. There is a strong public interest in maintaining the legal professional privilege and there would need to be at least equally strong arguments in favour of disclosure to override this. Having reviewed all the circumstances of the case the Commissioner is of the opinion that the arguments in favour of disclosure are not

sufficiently strong as to warrant disclosure in this instance. The Commissioner concludes that the public interest favours maintaining the exemption for the legal advice produced by the Office of the Advocate General for Scotland.

2nd Request

Section 35 – Formulation of government policy, etc.

39. The complainant has also requested legal advice which the Advocate General for Scotland himself may have provided in relation to the court case to which the complainant and the Driving Standards Agency are parties. The public authority originally refused to confirm or deny if it held the requested information under both section 42 and section 35 of the Act. During the course of the Commissioner's investigation the public authority confirmed that it was no longer seeking to rely on section 42 of the Act in exclusion of the duty to confirm or deny but maintained its position as regards section 35.
40. Section 35(1) provides an exemption from the Act for information which relates to the formulation or development of government policy; ministerial communications; the provision of advice by any of the Law Officers or any request for the provision of such advice; or the operation of any Ministerial private office. Read in conjunction with Section 35(3) the exemption provides, subject to the public interest, that the duty to confirm or deny does not arise in relation to information which falls within (or if it were held would fall within) one of these categories of exempt information.
41. The Advocate General for Scotland is a UK Law Officer and the complainant's request for information would fall within the scope of section 35(1)(c) because if the information were held it would constitute the provision of advice by a UK Law Officer. The Commissioner is satisfied that the section 35 exemption is engaged in this instance.

Public Interest Test

42. Section 35 of the Act is a qualified exemption. Section 2(1)(b) of the Act states that for this exemption to be maintained in order not to confirm whether information is held, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny must outweigh the public interest in disclosing whether the information is held.
43. The public authority advanced the following arguments in support of its decision to maintain the exclusion of the duty to confirm or deny.
 - The public authority argued that there is a strong public interest in ensuring that a government department is able to act free from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers. It highlighted the convention that neither the advice of the Law Officers, nor the fact that their advice has been sought, is disclosed outside government.

- The public authority argued that disclosure of the occasions when legal advice has been sought would have the effect of disclosing those matters which in the opinion of the government have a particularly high political priority or are assessed to be of particular legal difficulty. It suggested that this would be contrary to the strong public interest, inherent in the section 35 exemption, in allowing government to have a clear space, immune from exposure to public view, in which it can debate matters internally with candour and free from the pressures of political debate.
 - The public authority outlined what it saw as the possible effects of confirming or denying whether it held the requested information. It said that on the one hand, if it disclosed that a Law Officer's advice had been sought on a particular matter it could indicate that the government believed this to be of particular importance or was unsure of its legal position. It suggested that if this were to happen then the government may be less willing to request Law Officer's advice in future. Yet on the other hand, it said that if it disclosed that a Law Officer's advice had not been sought then it could expose the government to criticism for not having sought the "best" legal advice on a given issue. It argued that this would have the effect of putting pressure on the government to obtain the advice of the Law Officer's in inappropriate cases or in an unmanageably large number of cases.
44. Whilst it has said that it believes that the public interest favours maintaining the exclusion of the duty to confirm or deny the public authority has acknowledged that there is a public interest in confirming or denying whether the information requested by the complainant is held. It has said that it recognises that there is a general public interest in ensuring the accessibility of information to the public and in ensuring that people can have access to information about decisions that affect them. The Commissioner would agree with this but is also of the opinion that there is a public interest in knowing that a public authority has taken responsible decisions based on sound advice, including legal advice and knowing whether that advice has been followed.
45. Whilst the Commissioner accepts that there is a public interest in the public authority confirming or denying whether the requested information is held, the Commissioner accepts the arguments put forward by the public authority in support of the exclusion of the duty to confirm or deny and finds these arguments convincing. The Commissioner is of the opinion that where the specific elements of the section 35(1)(c) exemption apply there are clear *prima facie* public interest arguments supporting a refusal to confirm or deny whether the information is held. There would need to be at least equally strong public interest arguments in all the circumstances of a particular case for confirming or denying whether the information is held and the Commissioner feels that – although the case may be important to the particular complainant - such arguments are not present in this case.
46. The Commissioner considers that confirming or denying in a case where there is no strong public interest in the type of information that may be held (if indeed

such information were held) could have the negative effects suggested by the public authority. There is a real danger that such confirmation or denial could inhibit requests for, and the provision of, free and frank advice from the Law Officers in future. The general public interest in accountability and transparency is not sufficient to override the strong public interest in maintaining the convention that the fact that Law Officer's advice has or has not been sought is not disclosed.

47. The Commissioner finds that in all the circumstances of the case the public interest favours maintaining the exclusion of the duty to confirm or deny under section 35 of the Act.
48. Given that the section 35 exemption has been found to apply the Commissioner has not made a decision on whether or not section 42 applies in this case.

The Decision

49. The Commissioner's decision is as follows:

1st Request

- The public authority has complied with section 1(1)(b) of the Act because it correctly withheld the requested information under section 42.
- The public authority breached section 1(1)(a) of the Act by failing to inform the complainant that the information was held and breached section 17(1) of the Act by failing to inform the complainant that the information was being withheld.

2nd Request

- The public authority has complied with section 1(1)(a) of the Act by refusing to confirm or deny whether it held the requested information under section 35.

Steps Required

50. During the course of the investigation the public authority informed the Commissioner that it held information falling within the scope of the complainant's first request. This was not communicated to the complainant, however, the fact that the public authority holds information falling within the scope of the first request will be evident from reading this decision notice and therefore the Commissioner requires no steps to be taken by the public authority.

Right of Appeal

51. Either party has the right to appeal against this Decision Notice to the Information 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 4th day of April 2008

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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.”

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) 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 –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 42(1) provides that –

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

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”