

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 July 2010

Public Authority: Intellectual Property Office (IPO)
Address: Concept House
Cardiff Road
Newport
South Wales
NP10 8QQ

Summary

The complainant requested information that had been withheld from a specified individual. This related to the way that an earlier request had been handled by the public authority and the legal advice that was commissioned. The public authority issued a response and explained that it believed that all the relevant recorded information was exempt by virtue of section 42(1) [legal professional privilege] and that the public interest in maintaining that exemption outweighed the public interest in disclosure. The complainant requested an internal review and the public authority upheld its original decision.

The Commissioner has carefully considered this case. He has determined that the information was covered by legal professional advice privilege and he has determined that the public authority was correct that the public interest in maintaining that exemption did outweigh the public interest in disclosure in this case. He has therefore finds that section 42(1) has been applied correctly and upholds the public authority's position. He requires no remedial steps to be taken in this case.

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.

Background

2. The complainant is an interested bystander in [Individual redacted]'s long standing grievance with the Intellectual Property Office (and the bodies that were its predecessors).
3. The legal advice that is the subject of this case was provided in the context of how the public authority planned to deal with a previous request for information. This previous request for information resulted in the Information Tribunal decision that can be found at the following link¹ and this decision was appealed to the High Court.

The Request

4. On 20 November 2009 the complainant requested the following information in accordance with section 1(1) of the Act:

'I refer to your letter.... to [Individual redacted]. (I have been interested in [Individual redacted]'s case for several years.)

...

'I ask you to release 'the legal advice of 23rd March 2005 and associated emails on what information should or should not be provided' within 20 working days.'

5. On 7 December 2009 the public authority issued its response. It explained that it was relying on section 42 to withhold the information. It said that the documents in question contain advice from or discussions with the Intellectual Property Office's legal advisers in connection with [Individual redacted]'s various complaints and related proceedings and appeals. It is exempt because the public authority believed it could maintain a claim of legal professional privilege in legal proceedings. It explained that in making this decision, it had balanced any public interest in release of this information against the public interest in maintaining and applying legal professional privilege in this case. It provided details about its internal review process.
6. On 17 December 2009 the complainant requested an internal review. He explained:

¹http://www.informationtribunal.gov.uk/Documents/decisions/Szucs_Decisionwebsite26Feb08.pdf

'The decision is ridiculous. It could not be in the public interest to withhold [sic] the information requested in my letter of 20 November 2009. As a taxpayer, I wish to see the legal advice etc. on which public money has been spent...

Please review the decision.'

He also requested the name of the officer who made the decision in the original refusal notice.

7. On 11 January 2010 the public authority communicated the results of its internal review. It explained that this internal review concerned the withholding of the legal advice under section 42(1). It stated that it upheld its position and provided more detailed arguments about why. It explained that the exemption was engaged because the disputed information was a confidential communication that was created for the purposes of litigation and it was important that the confidential relationship between lawyer and client is protected to accord with their expectations. It explained that it was relying on a canon of decisions made by the Information Tribunal and High Court relating to the very substantial inbuilt public interest in maintaining the confidentiality of legally privileged material. It confirmed that it believed that the public interest arguments that favour the maintenance of the exemption outweighed those that favour disclosure. It explained that it believed that section 42(1) also applied to the connected emails. It also provided the name of the individual who dealt with the original request and explained that she had no role in the conduct of the internal review. It then provided the Commissioner's details as a further right of appeal.

The Investigation

Scope of the case

8. On 8 March 2010 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 following points:
 - That the decision made by the public authority had breached the Act and that the Commissioner should overturn it.
 - That he believes there is no such thing as public interest in applying and maintaining legal professional privilege in a case

of this type and that the responses provided by the public authority fail to validly rebut this.

- He explained that in his view there is usually but not always a public interest in maintaining the confidentiality of legally privileged material. He explained that this case was one where there was not.
 - The decision about whether the public interest in maintaining the exemption in previous Tribunal decisions are a question of fact and not law and they have no relevance to the public authority's duty to him.
9. For the avoidance of doubt, the Commissioner is considering whether the legal advice dated 23 March 2005 and the emails that led to it have been correctly withheld under section 42(1), or whether they should have been disclosed to the public. The complainant confirmed that he agreed that this was the scope of the investigation on 7 June 2010.
10. It is necessary to outline the structure of the information that is held that is relevant to the request to enable each item to be considered on its own merits. The information is:
- A copy of the legal advice itself dated 23 March 2005 ('item 1' [for the remainder of this notice]).
 - An email requesting legal advice about making the response under the Act ('item 2').
 - Covering email relating to the legal advice itself ('item 3').
 - An second email requesting further advice ('item 4').
 - An email providing further advice ('item 5').
 - An email acknowledging and discussing the further advice ('item 6').

Chronology

11. 14 April 2010: The Commissioner wrote to the public authority to explain that he had received a relevant complaint. He asked to receive a copy of the withheld information and further arguments about why it was being withheld.

12. 14 May 2010: The Commissioner telephoned the public authority to provide a reminder that he required the withheld information. He was told that it had already been sent to him.
13. 16 May 2010: The Commissioner received the withheld information and further arguments. The public authority also explained the background of the information.
14. 24 May 2010: The Commissioner wrote to the complainant in order to confirm the nature of his role and the scope of this case. He also asked the complainant to provide further public interest arguments in favour of disclosure, if he had any that he wanted the Commissioner to consider.
15. 7 June 2010: The complainant confirmed the scope of the investigation. He also explained the background of this case and asked the Commissioner to clarify a number of things. The Commissioner received this letter on 14 June 2010.
16. 14 June 2010: The Commissioner acknowledged the receipt of the letter and provided the clarification that was sought.
17. The Commissioner then telephoned the public authority to make further enquiries about the public authority's position on the same day.

Analysis

Exemption

Section 42(1)

18. The public authority has explained that in its view all six items are covered by legal professional privilege and that it can apply section 42(1) to them all. It also explained that in its view the public interest in maintaining the exemption outweighed that in disclosing the material.
19. Section 42(1) of the Act is worded as follows:

"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information"

20. The application of section 42(1) of the Act was considered by the Information Tribunal in the decision of *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry [EA/2005/0023]* where legal professional privilege was described 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 her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client." (Paragraph 9)

21. The principle of legal professional privilege was considered in detail by the House of Lords in *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants) [2004] UKHL 48*, where Lord Rodger explained the policy reasons for the principle with respect to legal advice:

'If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available.'

(at Paragraph 54)

22. Section 42(1) is a qualified exemption. This means that there is a two step approach that needs to be taken. The Commissioner must first consider whether the exemption is engaged and then, where it is, he will go on to consider whether or not the balance of public interest favours the maintenance of the exemption.

(1) *Is the exemption engaged?*

23. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
24. The category of privilege which the public authority is relying on to withhold this information is advice privilege. This is a variation from its

position in its refusal notice and internal review. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. It was considered in detail in the *Three Rivers* case above where it was explained that there were three requirements for material to engage legal professional advice privilege. The Commissioner has adopted this approach in this case and these factors can be summarised as follows:

1. It must be between a qualified lawyer in their professional capacity and a client.
 2. It must be created with the sole or dominant purpose of obtaining or providing legal advice.
 3. It must be confidential.
25. The first requirement is one of fact. In this case all six items of correspondence are between a lawyer acting in their professional capacity and a member of staff of the public authority (their client). This requirement is therefore satisfied.
26. The Commissioner is also satisfied that the fact the advice was in-house advice does not change the public authority's ability to claim that the information was privileged. This accords with the decision of the Information Tribunal in paragraphs 29 to 35 of *Calland v Financial Services Authority* [EA/2007/0136]. The Tribunal explained that it believed that in-house lawyers deserved the same protection as external ones. The Tribunal stated that:
- 'Such a result accords with the general policy giving rise to LPP. Just the same requirements for confidentiality and candour exist where an employed lawyer gives advice as when it comes from a member of the independent professions' (at paragraph 35).*
27. The second requirement is also one of fact. The Commissioner has examined the withheld information and is satisfied that in all six cases the sole purpose was obtaining or providing relevant legal advice. The requirement is therefore also satisfied.
28. The last requirement is an issue of law. The Commissioner believes that the six items may be deemed confidential. This is because the information is of substance, was imparted in circumstances that led to an expectation of confidence (it was formal legal advice between a lawyer and their client) and the disclosure of the information could lead to an erosion of this confidence which would not accord with the

expectations of the confider. This erosion of confidence could cause damage to the confider as its position may be prejudiced through unexpected disclosure. The final requirement is therefore satisfied.

29. The Commissioner's view is also that public authority has not waived its privilege in this case. The Commissioner notes that this is a situation of advice privilege. He believes that, in circumstances other than litigation, partial disclosure, such as the issuing of the response to [individual redacted], will not result in waiver of legal advice privilege. His view has been confirmed by the Information Tribunal in *FCO v Information Commissioner (EA/2007/0092)*² which stated:

'There is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent will see what he is doing and demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate. Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned. Quite different is the position where the parties come to court; if evidence is adduced, it is there to be fully tested or scrutinised in relation to any relevant issue, whether it be witness, document or object.' [at paragraph 22]

30. The Commissioner is satisfied that the information that has been provided to the public does not falsely represent the withheld information. He is also satisfied that on the facts of this case that there is no waiver, that the confidentiality of the advice remains and the exemption is engaged for all six items. He will now move on to consider the public interest test.

(2) The public interest test

31. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner is only able to consider factors that are relevant to and inherent in the exemption being claimed when

² This decision can be found at the following link:
http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf

considering the maintenance of the exemption but can consider all public interest factors when weighing the public interest factors that favour disclosure.

32. It is important to note from the outset that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. It is also important to note that just because some members of the public may be interested in the information, does not necessarily mean that the release of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public³.

Public interest arguments in favour of maintaining the exemption

33. In arguing that the public interest favoured withholding this information, the public authority has reiterated the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals. Furthermore, the public authority highlighted the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of section 42(1).
34. It explained that government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments. As a consequence legal advice may well set out the perceived weaknesses of the public authority's position. Without such comprehensive advice, the Government's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.
35. Disclosure of legal advice has a significant prejudice to the public authority's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the

³ *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.

36. It is also possible that there may even be a reluctance to seek legal advice. This could lead to decisions being taken that are legally unsound. Not only would this undermine the public authority's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided. The Commissioner acknowledges that there is a public interest in the proper administration of justice and the concept of legal professional privilege plays an important role in maintaining this. For example the Commissioner has considered Lord Taylor of Gosforth CJ's obiter dictum on this point in *R v Derby Magistrates Court, Ex p B* [1996] AC 487:

'The principle that runs through all of these cases... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client [in this case, the Home Office], must be sure that what he tells his lawyer in confidence will never be revealed without his consent'.

37. In addition it may be the case that wider consideration of the legal position in other situations will need to be discussed. It is proper that the public authority is able to consider the wider picture and potentially rely on the advice in the future (both in this case and others). This is a further public interest in maintaining the exemption.
38. Further in this case the position of the public authority in this matter has been subject to considerable scrutiny. The Information Commissioner considered [individual redacted]'s original case and the Information Tribunal upheld both the public authority's and the Commissioner's decision. The public authority believes that the fact that its position had been tested in such a forum enhances the weight that can be put on the public interest in maintaining legal professional privilege in the circumstances of this case. The Commissioner does believe that the public interest in maintaining the legal professional privilege concept is strengthened by the fact that the information that is the subject of the (withheld) legal advice was itself subject to an Information Tribunal decision, where the information was deemed to be correctly withheld
39. The public authority concluded that although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professional privileged material, it is

likely to only be in 'exceptional circumstances' that this will be outweighed by the public interest in disclosure. It explained that it regarded the advice as being live at the date of the request because [individual redacted]'s complaint is a long running one.

40. While the Commissioner does not accept 'exceptional circumstances' are required, he does acknowledge the strength of the arguments advanced by the public authority. Indeed, there is a significant body of case law to support the view that there is a strong element of public interest built into section 42(1). The *Information Tribunal in Bellamy* noted that:

'there is a strong 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, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.' (at paragraph 35)

Public interest arguments in favour of disclosing the requested information

41. However, it is important to remember that these factors are balanced against the arguments in favour of disclosing the legal advice which forms part of the requested information; Parliament did not intend the exemption contained at section 42 of the Act to be used absolutely. Indeed the Tribunal's decision in the case of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* [EA/2007/0052] ('Mersey Travel') underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. In particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore the advice related to matters which affected a substantial number of people.
42. In the Commissioner's opinion there is a strong public interest in people understanding the reasons for decisions made by public authorities, or in this case the reasoning behind the public authority's decision not to provide the information to [individual redacted]. Disclosure of the legal advice may assist the public's understanding of why the public authority has made the decision it has.
43. Furthermore, disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good

quality legal advice and thus increase public confidence in the public authority's position.

44. The complainant has also pointed out that the advice was generated through the expenditure of public money and that transparency would be in the public interest. As the complainant stated the benefits of democracy depend on the availability to the public of relevant information.
45. In addition the Commissioner has considered the number of people that would be affected by the measure at the heart of the legal advice and whether further weight should be given to the public interest factors that favour disclosure on the basis of the case in *'Mersey Travel'*. He notes that the legal advice legitimately concerns [Individual redacted], his family and other individuals who may have concerns about how the public authority operates. However, the number of individuals is not of the same magnitude as in *'Mersey Travel'* and therefore this factor does not add additional weight in this instance.

Balance of the public interest arguments

46. The Information Tribunal in *Calland v Information Commissioner and the Financial Service Authority* (EA/2007/1036)⁴ explained the Tribunal's approach when considering the balance of the public interest in this exemption (at paragraph 37):

'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.'

47. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. In *Dr Thornton v Information Commissioner* (EA/2009/0071)⁵, the Tribunal usefully distilled the High Court's approach into six principles:

1. there is a strong element of public interest inbuilt into the exemption;

⁴This decision can be found at:

http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf

⁵ At paragraph 15.

2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
 3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
 4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
 5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
 6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
48. In this case the Commissioner believes that the strong inbuilt public interest argument for the protection of legal professional privilege is important. He notes when considering the fourth point that this legal advice was live at the time of the request and this intensifies the strength of protection that is to be expected. He has also been satisfied that the scrutiny the original decision has undergone gives further weight to the strong inbuilt public interest argument. He believes that this case falls into the circumstances that were envisaged to be covered by the exemption in section 42(1).
49. The Commissioner has had the opportunity of seeing the withheld information. Clearly he cannot reveal its contents. In his view, however, it does not raise concerns that the public authority may have misrepresented the advice which it has received, or that it may be pursuing a policy which appears to be unlawful or there may be clear indications that it has ignored unequivocal advice which it has obtained.
50. The Commissioner has considered the weight of the public interest factors in favour of disclosure but is not convinced on the circumstances of this case that they come close to being the strong countervailing factors that would be needed to be at least equal to the public interest factors in maintaining the exemption.

51. For all the reasons above, he is therefore satisfied that the public interest in maintaining the application of the exemption outweighs the public interest in disclosure.
52. He therefore determines that the exemption found in section 42(1) has been applied correctly and does not uphold the complaint.

Procedural Requirements

53. The public authority also complied with all the procedural requirements of the Act in this case.

The Decision

54. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act. It was entitled to rely on section 42(1) to withhold the relevant recorded information for this case.

Steps Required

55. The Commissioner requires no steps to be taken.

Right of Appeal

56. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 15th day of July 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

Section 1 provides that:

(1) 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 42 – Legal professional privilege

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.