

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 January 2011

Public Authority: The Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested confirmation of the dates on which the Secretary of State for Justice took two decisions. The Ministry of Justice (MoJ) refused the request on the basis that the information was subject to legal professional privilege and therefore exempt by virtue of section 42 of the Freedom of Information Act 2000. The Commissioner has investigated and has determined that the exemption is not engaged, and the MoJ was not justified in refusing the request. Therefore the Commissioner finds that the withheld information should be disclosed. He also concluded that the MoJ breached its procedural obligations.

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. On 17 May 2010, the complainant, on behalf of its clients, wrote to the Ministry of Justice (MoJ) with the following request:

"On behalf of our clients we request that you provide us with confirmation of the date that the Secretary of State for Justice decided to (1) reject the two settlement options following the mediation in November 2008 (as notified to this firm in the letter dated 23 April 2010 from TSol [the Treasury Solicitor]); and (2) to

commence proceedings against our Clients as notified in the letters dated 4 May 2010 as indicated in TSol's letters dated 4 May 2010."

3. The MoJ responded on 27 May 2010 confirming that it holds the requested information but refusing to disclose it, citing the exemption in section 42(1) (legal professional privilege) of the Act.
4. The complainant requested an internal review on 3 June 2010.
5. The MoJ upheld its decision in its internal review correspondence dated 2 July 2010.

The Investigation

Scope of the case

6. On 13 July 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:

"Our FOI request specifically asked for confirmation of the dates only on which the Secretary of State made two fundamental decisions. Our request did not seek copies of correspondence between the Secretary of State and his legal advisers or documents created for the purpose of obtaining litigation advice. Accordingly, and given the law of privilege and the ICO's guidance on this matter, we simply cannot understand or accept the basis upon which [the MoJ] seeks to assert LPP and we contend that any attempt to do so is untenable."

Chronology

7. Further to initial telephone contact with the MoJ, the Commissioner wrote to it on 17 November 2010 for further explanation of its reasons for citing section 42 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information requested.
8. The Commissioner required the MoJ to respond by 16 December 2010. He advised the MoJ that, in the absence of any further submissions, he would proceed to issuing a Decision Notice on the basis of the arguments it had already put forward.
9. The MoJ contacted the Commissioner on 22 December 2010 saying that it was unable to respond within the agreed timescale "*due to unforeseen*

circumstances" and requesting an extension to 5 January 2011. The Commissioner agreed to this.

10. Despite giving the MoJ ample opportunity to respond, including making numerous attempts to contact the MoJ to remind it of the need to respond, the Commissioner has not received any further correspondence from the MoJ.

Analysis

Exemptions

11. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023) the Information Tribunal described LPP 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, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation..."(paragraph 9).

12. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.
13. In this case the MoJ has claimed that the withheld information is subject to litigation privilege.

Litigation privilege

14. The Commissioner considers that litigation privilege may only be claimed in respect of certain limited communications that meet the following requirements:
 - (i) litigation is pending or in contemplation;
 - (ii) the communication is made between the appropriate parties; and

(iii) the dominant purpose for the creation of the documents/information was to assist in the litigation.

15. In order to determine whether the information is subject to litigation privilege the Commissioner has considered each of these requirements in turn.

Litigation is pending or in contemplation

16. As set out in his guidance¹ on this matter the Commissioner's view is that the appropriate test for deciding on the degree of likelihood of litigation is whether or not there was a reasonable prospect (not just a fear or possibility) of litigation at the time of the creation of the information.
17. As the information requested relates to the timing around when a decision was made to commence proceedings, and as both parties have acknowledged the relevance of the requested information to a claim, the Commissioner is satisfied that this requirement is met.

The communication is made between appropriate parties / Dominant purpose

18. In the Commissioner's view, in order to rely on litigation privilege, the dominant purpose of the communications must be to obtain advice to assist in the litigation, and the communications must be made between a professional legal adviser and client – although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
19. The MoJ has argued that:
- "the dates you have requested constitute litigation legal privilege as they were created for the 'dominant purpose' of obtaining legal advice on litigation."*
20. The MoJ has not provided the complainant with any explanation of its reasoning as to how, in the circumstances of this case, the dominant purpose of the requested information can be regarded as being to assist in the preparation or assistance of a case.

1

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/tailed_specialist_guides/legal_professional_privilege.pdf

21. Furthermore, as the Commissioner has not been provided with any information about the parties concerned, he is unable to conclude that a relevant communication was made between appropriate parties.
22. It follows that, as he cannot be satisfied that this requirement is met, he is unable to determine that the withheld information attracts litigation privilege. He therefore does not find the exemption engaged and requires disclosure.

Procedural Requirements

23. In providing an inadequate explanation to the complainant of its application of the section 42(1) exemption, the public authority breached section 17(1)(c).

The Decision

24. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it incorrectly applied the exemption at section 42(1), and breached section 17(1)(c).

Steps Required

25. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose the requested information to the complainant.
26. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

27. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

28. 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

29. 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.
30. 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 31st day of January 2011

Signed

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

Legal Annex

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.”