

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 June 2013

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested records of communications between the MOD, its agents and a firm of chartered surveyors concerning a long-running tenancy dispute between the complainant's partnership and the MOD.
2. The Commissioner's decision is that the MOD correctly withheld the requested information under Section 42(1) (legal professional privilege exemption).
3. The Commissioner does not require the MOD to take any action.

Request and response

4. On 10 April 2012, the complainant wrote to the MOD and requested information in the following terms:

'Copies of any records of communications in whatever format between 1st October 2005 and 1st December 2005 by Defence Estates (now the Defence Infrastructure Organisation), or any of its agents and Landmarc Support Services and/or Smiths-Gore Chartered Surveyors and/or SGDN Ltd concerning the Case D Notice to Quit Arbitration against (names redacted).'

5. The MOD provided its substantive response on 7 June 2012. Although some information within scope of the request was provided the MOD advised that after considering the public interest the remaining

information requested was being withheld under Section 42(1) as it was subject to legal professional privilege.

6. Following an internal review the MOD wrote to the complainant on 11 July 2012. It stated that the request had been interpreted as a request for information between Defence Estates and the other parties mentioned and so information considered in scope of the request was not restricted solely to outgoing communications from Defence Estates. The internal review upheld the application of Section 42(1) to the request.
7. On 22 May 2012 the complainant made a supplementary request for a *'copy of the letter which indicates at some point in 1999 that Wilsons (firm of solicitors) gave advice to Humberts (land agents) whilst acting as agents for Defence Estates'*.
8. The MOD responded to this request on 13 July 2012 and advised the complainant that the requested letter was being withheld under Section 42(1). This decision was upheld by an internal review on 23 July 2012.

Scope of the case

9. The complainant contacted the Commissioner on 13 August 2012 to complain about the way his request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine whether the MOD correctly applied Section 42(1) to the information requested by the complainant in his two requests of 10 April and 22 May 2012. He considers that the interpretation of the complainant's request of 10 April 2012 by the MOD was reasonable and correct.

Reasons for decision

11. Section 42(1) provides an exemption for information subject to legal professional privilege. As a qualified exemption, Section 42(1) is subject to the public interest test, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
12. There are two types of legal professional privilege (LPP); litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real

prospect or likelihood of litigation, rather than just a fear or possibility. In order for information to be covered by litigation privilege, it must have been created for the main purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.

13. The Commissioner has had sight of and considered the withheld information, which consists of email and letter correspondence between the parties identified by the complainant in his requests. With the exception of one letter (addressed in paragraph 14 below) the correspondence consists of either requests for, or the provision of, legal advice concerning the complainant's rent dispute litigation which the MOD has stated commenced in 1998. The Commissioner is therefore satisfied that the information is subject to litigation privilege and thus caught by Section 42(1).
14. The Commissioner notes that one letter was sent to Defence Estates from a land agent and was thus not a communication between a lawyer and client. However, litigation privilege can apply to communications outside the lawyer/client relationship, providing the primary purpose of those communications was for genuinely anticipated litigation. An example might be communications between two medical experts instructed to give evidence in a clinical negligence case. In this case, it is clear from the contents of the letter that its purpose was to provide advice with regard to the rent dispute litigation and to assist the Defence Estates lawyers. Therefore, the Commissioner is satisfied that this letter is also covered by litigation privilege and therefore exempt under Section 42(1).

Public Interest Balance

15. Having found that the exemption has been correctly applied to the requested information, the Commissioner has gone on to consider the public interest factors present in this particular case.
16. In submissions to the Commissioner, the complainant has alleged that a conflict of interest occurred when the firm of chartered surveyors which his partnership instructed to help advise and assist them with anticipated arbitration/litigation against their landlord, the MOD, were also part of a consortium (Landmarc Support Services) bidding for a nationwide contract to supply the MOD with rural land management services (which they were subsequently awarded). The complainant informed the Commissioner that this alleged conflict of interest was only brought to the partnership's attention in November 2005, by which time a Notice to Quit Arbitration had been commenced arising from a rent increase contested by the complainant.

17. The complainant advised the Commissioner that the chartered surveyors subsequently withdrew their services to his partnership and he believes that they did so in order *'to avoid embarrassment to their bigger, more influential and powerful client (the MOD) who would clearly be embarrassed if it was seeking to deny liability for repairs which its own public-private partners were contesting'*. The complainant has expressed the view that the sequence of events suggests that the MOD (or one of their advisors) decided to *'lean-upon'* the chartered surveyors in order to advantage their position. It is this alleged conflict of interest, and the consequences to the complainant's partnership, which forms the basis for the complainant's belief that the public interest supports disclosure of the information requested.
18. In submissions to the Commissioner the complainant has contended that, *'we believe that whilst the area of interest is inevitably of specific interest to us, the wider issues, namely the danger of Government Departments being able to cover-up otherwise illegal activities by its civil servants (or at least breaches of the Civil Service Code of Conduct) and their lawyers is of much wider importance'*. He added that, *'legal privilege for lawyers acting within Government Departments should not be allowed to protect them when they abuse their position of power'*.
19. The Commissioner would agree that legal privilege cannot be used as a cover for illegal or corrupt behaviour or conduct by public authorities or those representing them. However, the information requested by the complainant and withheld by the MOD under Section 42(1) does not show or indicate any such illegal activity. Whilst the Commissioner is obviously unable to reveal the contents of the communications concerned, he considers that they are in keeping with what would be expected in the course of a protracted rent dispute between private parties and that the specific contents neither contain nor give rise to any wider public interest.
20. Moreover, even if there was a conflict of interest in this matter as contended by the complainant, this would be a legal issue strictly specific to the parties and not a relevant factor for supporting disclosure of the information in the public interest. If the complainant is correct and the firm of chartered surveyors effectively abandoned his partnership in favour of its interests with the MOD, then the responsibility for such an unsatisfactory situation would lie with the chartered surveyors, who are not a public authority for the purposes of the FOIA, as would any redress sought by the complainant.
21. The Commissioner accepts that in terms of the contractual relationship between the parties, any such conflict of interest could have significant consequences for those parties. But in the context of the FOIA regime which operates on the basis of information being available to the world

at large and having public, rather than private interest, any such conflict of interest would be confined to the parties in dispute and not constitute the type of wider public interest concern which the Act is designed to channel.

22. In its responses to the complainant's request of 10 April 2012 the MOD acknowledged that disclosure of the communications concerned '*would provide an insight into the MOD's decision making processes and demonstrate the department's commitment to transparency*'. In addition, disclosure would further '*the public's understanding of government decision making, in this case related to how Defence Estates has taken account of legal advice on which to base its decision about a specific tenancy agreement at (name of premises redacted)*'. With regard to the Wilsons/Humberts letter requested by the complainant on 22 May 2012, the MOD noted that the age of the letter (1999) would favour disclosure, but that legal proceedings surrounding the complainant's tenancy were still ongoing and so '*any insight into DIO (Defence Infrastructure Organisation) could still have current relevance*'.
23. In reaching his decision in this case, the Commissioner has taken account of the general public interest in the openness and transparency of the MOD. However, as noted above the withheld information concerns legal advice about a private tenancy dispute. As such, it is necessarily case specific and would not provide insight or information into the MOD's contractual relationships with its tenants more generally. In this respect the Commissioner would agree with the MOD's contention that, '*Although there is an interest amongst the parties associated with the claim to which the information relates, there is no significant wider public interest in its disclosure*'.
24. Set against such a slight public interest case for disclosure is the strong in-built public interest in maintaining legal professional privilege as noted by the Information Tribunal in Bellamy and Secretary of State for Trade and Industry (EA/2005/0023). In that case the Tribunal made clear (at paragraph 35 of the judgement) that '*at least equally strong countervailing considerations would need to be adduced to override that inbuilt 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 case*'. This does not mean that Section 42(1) should be treated as an absolute exemption, but it does mean that there must be some clear and compelling justification for disclosing the specific information, such that the strong in-built public interest in protecting confidential communications between lawyer and client is sufficiently outweighed.

25. For the reasons given above, the Commissioner does not consider that the withheld information in this case carries any such compelling public interest case for disclosure. Indeed, since it concerns legal advice given in a private tenancy dispute, it falls substantially short of the sort of public interest justification which would be required for disclosure.
26. In submissions to the Commissioner the complainant disputed the MOD statement that the withheld information was still subject to on-going legal proceedings, as they could only relate to the Rent Review Arbitration which was concluded by 2005. However, the MOD has advised the Commissioner that whilst the rent for the complainant's property was finally determined in mid-2004, that decision is subject to a second phase of litigation to enforce payment of the increased rent and this litigation has still not concluded.
27. The MOD has argued that the release of information of such a limited public interest would give the complainant an unfair advantage in the current legal proceedings and any other dispute which the complainant might be contemplating against the MOD or any of its staff who have been previously involved in the management of this particular tenancy relationship or who have been witnesses in the on-going litigation.
28. In addition, the MOD has stated that the disclosure of the information *'jeopardises the ability of one party to take advice through its lawyers with its land agents in formulating possible compromise of disputes. Any party to litigation has to consider dispute resolution and any such negotiations in that process have to be formulated and conducted on a 'without prejudice' basis. Disclosure of correspondence of this nature prevents consideration of such matters'*. This is precisely the public interest which LPP is designed to protect and the Commissioner recognises and accepts the importance of the same.
29. In its response to the complainant, the MOD asserted that the release of the information could prejudice the outcome of the legal proceedings or prolong them unnecessarily, incurring further legal costs that would have to be met from defence funds. It was stated that given the pressure on the public finances, this would not be in the public interest. Whilst the Commissioner would agree with this proposition, he does not consider it to be a particularly persuasive argument for the MOD to make in this particular case, given that these proceedings date back more than 10 years as it is, quite possibly having cost more to defence funds than the actual rental amounts in dispute.
30. However, the fact that this individual landlord/tenant dispute remains subject to legal proceedings only goes to strengthen the importance of maintaining the confidentiality of the communications requested by the complainant (including the Wilsons/Humberts letter). Aside from the

general public interest in transparency and openness the Commissioner does not consider that the actual withheld information carries any specific or compelling public interest.

31. By its very nature (and as the complainant himself acknowledged in his complaint to the Commissioner), the information is of specific interest to the parties in dispute. The information cannot be said to contain or give rise to any wider significant public interest and as such the Commissioner is satisfied that the balance of the public interest lies firmly in favour of maintaining legal professional privilege and that the MOD were correct to withhold the information requested under Section 42(1).

Right of appeal

32. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF