

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2013

Public Authority: Intellectual Property Office (which is an operating name of the Patent Office)

Address: Concept House
Cardiff Road
Newport
Gwent
NP10 8QQ

Decision (including any steps ordered)

1. The complainant has requested internal communications regarding the redactions to submissions received in response to a 2012 public consultation run by the UK Intellectual Property Office ("IPO"). The IPO made a partial disclosure but after an internal review, it argued that it was not obliged to provide the remainder by virtue of section 42 (legal professional privilege exemption) and section 40(2) (unfair disclosure of personal data).
2. The Commissioner's decision is that the IPO is entitled to rely on section 42 and section 40(2) as a basis for withholding the remainder of the requested information. He has also decided that a small portion of the requested information is exempt under section 40(1) because it is the personal data of the requester.
3. No steps are required.

Request and response

4. According to its website, Intellectual Property Office is an operating name of the Patent Office.¹
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¹ <http://www.ipo.gov.uk/about/history.htm>

5. On 21 September 2012, the complainant wrote to the IPO and requested information in the following terms:

"I would like to request all internal communications regarding the redactions to consultation submissions for the Consultation "Consultation on proposals to change the UK's copyright system" (Reference 2011-004) which closed March 21 2012. When publication of the responses was made July 26 2012 a statement was made concerning redactions because 'a small number of respondents had advanced criticisms or inappropriately criticised the activities of others in the sector'.

I would like a copy of the criteria for redactions, any internal emails/documents concerning the redactions, and the names and positions of those involved in the redaction actions. I'd also like a copy of the minutes of any meeting which involved/covered the redactions."

6. The IPO responded on 18 October 2012. It stated that it was relying on the FOIA exemptions at section 40(2), section 42 and section 36(2) but needed further time to consider the balance of public interest. It provided a substantive response on 16 November 2012.
7. On that date, it provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
 - section 40(2) (Unfair disclosure of personal data)
 - section 42 (Information subject to legal professional privilege)
8. Following an internal review the IPO wrote to the complainant on 16 January 2013. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 11 February 2013 to complain about the way his request for information had been handled. He emphasised what he considered to be the strong public interest in disclosure particularly given, in his view, the IPO's over-zealous interpretation of libel law that arguably amounted to censorship of a public consultation exercise.
10. The Commissioner has therefore considered the IPO's application of sections 40(2) and 40(2).

Reasons for decision

11. Section 42(1) provides an exemption for information subject to legal professional privilege. This is a class-based exemption. Information which falls within this class is exempt from disclosure. However, by virtue of section 2 of the FOIA, Section 42(1) is qualified by a 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. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies.
13. The Commissioner has considered the withheld information, which, as described in the request, consists of correspondence at the IPO with associated documents. Having checked a number of points with the IPO, for example, to ascertain whether certain parties to the correspondence are, in fact, legal advisers, the Commissioner is satisfied that the information is subject to advice privilege and is therefore exempt under section 42(1). The complainant has also specifically requested the names of individuals contained within the withheld information. For completeness, the Commissioner has considered this point separately below.
14. As noted above, section 42(1) is qualified by a balance of public interest test.

Public Interest Test

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. The complainant has drawn particular attention to what he sees as an inaccurate interpretation of libel case law that has resulted in censorship of information that should be routinely released following a public consultation. With regard to his own submissions as part of the consultation, he set out in detail why none of what he provided to the IPO could reasonably be construed as libellous. If IPO took the view that certain of his submissions could be construed as libellous (an error, in his opinion) then it will have adopted the same approach in other cases. He argues that this erroneous approach is to the detriment of openness

and transparency and may lead to flawed public policy making on the matter covered by the consultation exercise. He argued that there was therefore a compelling public interest in seeing what advice had been sought and received.

17. The IPO explained that it sought advice regarding any legal risk to itself or to those who had responded to its consultation where it published those responses. Its specific submissions on the application of section 42 were somewhat slim. It explained that:

"Copyright is a deeply polarizing subject, and on this occasion proved no exception. The IPO generally favours disclosure of views elicited through consultation and all our consultation documents carry a warning that submissions might be released under the provisions of the FOI Act. Disclosure of the discussions held with our legal advisor on how the IPO decided whether to publish the small number of responses containing the most forcefully expressed views, could deter others from participating in future consultations, which we believe would not serve the public interest and outweighs the transparency argument which favours disclosure."

18. The Commissioner would observe that this argument does not address the prejudice envisaged by the exemption at section 42. That exemption is not designed to protect the integrity of the public consultation process. As such, this comment does not show how weight should be added to the public interest in maintaining the exemption at section 42. However, the Commissioner notes the IPO also alluded (in its other submissions to him) to its concerns about protecting lawyer-client confidentiality.
19. It also asserted that "the IPO is not obliged to publish all consultation responses in full, but opts to do so whenever possible so long as it is satisfied that it doesn't leave itself, or others, open to litigation".
20. The Commissioner recognises that, as section 42 is a class-based exemption, this demonstrates, in effect, an inbuilt public interest in protecting communications between lawyer and client that are subject to legal professional privilege. In considering the balance of public interest, the Commissioner is mindful of comments made 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. However, it does mean that there must be some clear and compelling justification for disclosing the specific information, such that the strong inbuilt public interest in protecting confidential communications between lawyer and client is outweighed.

21. The complainant has drawn attention to what he sees as flaws in the IPO's decision-making in terms of what can and cannot be published. He also draws attention to the risks to public policy making where a complete picture is not considered. Regardless of whether, or to what extent the complainant's analysis is correct, it is a matter of fact that information that one would generally expect to be published (submissions to a public consultation exercise) has not been published following that exercise. The Commissioner is not certain how this negatively impacts on the IPO's own policy making process because the IPO retains a full version of all responses. However, those following the matters covered by the consultation exercise are not in a position to check whether the IPO has a complete picture of relevant matters following the consultation exercise. The Commissioner recognises that there is a strong public interest in learning more about why this is the case.
22. The Commissioner would note that the complainant has not requested the submissions that were withheld from publication following the consultation exercise. He has requested information about legal advice was sought and received in order to justify withholding those submissions.
23. The Commissioner acknowledges that there is a public interest in understanding more about the IPO's thinking when it decided to withhold parts of some of the submissions to its public consultation exercise. The complainant has identified what he believes are fundamental flaws in the IPO's reasoning. He gave examples from his own submissions which, he argues, constitute public domain information. He argued that this supported his view that any legal advice which raised concerns about libel action would be flawed. He also queried the notion that his submissions could not be robustly defended. Arguably, there is a public interest in testing the requested information (legal advice) against the complainant's analysis in order to determine the relative merits of advice that was obtained at public expense.
24. However, the Commissioner is not persuaded that the complainant's arguments are sufficiently compelling to outweigh the public interest in protecting lawyer-client confidentiality. In reaching this view, he has had particular regard for the age of the information withheld from disclosure under the FOIA in this case. The requested information is from 2012 and is therefore relatively recent. It clearly attracts advice privilege. The Commissioner considers that this adds particular weight to the public

interest in maintaining the exemption at section 42 and protecting lawyer-client confidentiality in this case.

Section 42 – Conclusion

25. The Commissioner has concluded that the IPO is entitled to rely on section 42 of the FOIA in relation to the information to which this exemption has been applied.

Section 40 – Unfair disclosure of personal data

26. The complainant has also specifically requested the “names and positions of those involved in the redaction actions”. The IPO cited Section 40(2) as its basis for refusing to provide these.
27. Section 40(2) of FOIA states that personal data (which is not the personal data of the requester) is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act (“DPA”). The term “personal data” is defined specifically in the DPA.²

Does the requested information include third party personal data?

28. In determining whether information is the personal data of individuals other than the requester, that is, third party personal data, the Commissioner has referred to his own guidance and considered the information in question.³ He has looked at whether living individuals can be identified from the requested information and whether that information is biographically significant about them.
29. He is satisfied that the names of individuals in the requested information are those individuals’ personal data. It is information relating to each of them from which each can be identified. It shows not only their place of employment but also that they were involved in particular projects at that place of employment. The Commissioner is satisfied that information which shows where a person is employed is biographically significant about that person.

² <http://www.legislation.gov.uk/ukpga/1998/29/contents>

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[http://www.ico.org.uk/for_organisations/data_protection/the_guide/~/media/documents/library/Data Protection/Detailed specialist guides/PERSONAL D
ATA FLOWCHART V1 WITH PREFACE001.ashx](http://www.ico.org.uk/for_organisations/data_protection/the_guide/~/media/documents/library/Data%20Protection/Detailed%20specialist%20guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx)

30. The next question for the Commissioner to consider is whether disclosure of that information under FOIA would contravene any of the data protection principles of the DPA.
31. The data protection principle that is normally considered in relation to section 40 is the first data protection principle which states that:
- ‘Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
- at least one of the conditions in Schedule 2 is met, and
- in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.’
32. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
33. Furthermore, notwithstanding the individual in question’s reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.

34. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
35. In this case, the complainant has argued that he is already aware of the names of certain of the individuals involved in the correspondence because he has spoken directly to them when raising concerns about the redacted publication of consultation responses. He argues that it would follow that their names would be released to him.
36. The IPO has argued that the names and contact details that had been redacted were those of junior civil servants who did not have outward facing roles. It explained that there was one individual who was at "SCS" (or Senior Civil Servant) grade whose name had not been redacted. This person has a reasonable expectation that their name would be disclosed given their seniority.
37. The Commissioner recognises that the complainant is already aware of some of those IPO employees who were involved in the requested correspondence. However, it is an accepted tenet of FOIA that disclosure under the FOIA is disclosure to the world at large and not to individuals. The Commissioner has considered the question of fairness in this case by looking at whether it would be fair to the individuals concerned to put their personal data into the public domain in this context.
38. The Commissioner notes the complainant's view that the officials in question are not junior and, given their involvement with the matter covered by the request, they should have a greater expectation that their names would be published. The Commissioner disagrees with this view. While some of the individuals named in the withheld information do, on occasion, deal with members of the public, the Commissioner is satisfied that their roles are relatively junior and that they are not outward facing roles. He agrees that it is outside their expectations that their names would be published and that such expectations are reasonable in this context.
39. Further, he considers that disclosure of this personal data outside the reasonable expectations of the individuals concerned is not necessary in order to satisfy the legitimate interests of the public. There is a legitimate interest in improving transparency by public authorities. The Commissioner recognises that the complainant is keen to learn who at the IPO said what about the matter described in the request. Where

information has been disclosed, the Commissioner does not think that transparency would be significantly enhanced by the disclosure showing to which junior official a remark can be attributed or which junior official received particular correspondence. Where information has been withheld because it is exempt under section 42, the Commissioner does not think that transparency would be further enhanced by the isolated disclosure of junior officials' names contained within it.

40. In light of the above, the Commissioner has therefore concluded that disclosure of the names of individuals found in the withheld information would be unfair and in contravention of the first data protection principle of the DPA. Consequently, he considers that the names are exempt from disclosure under section 40(2) of the FOIA.

Section 40(1) - Personal data of the requester

41. The Commissioner identified certain information within the bundle provided to him by the IPO which was the personal data of the requester. Under Section 40(1) of the Act, information which is the personal data of the requester is absolutely exempt from disclosure to that person under the FOIA. The FOIA is not the route by which a person can access information about themselves.
42. In response to the Commissioner's queries, the IPO acknowledged that a small part of the withheld information could be construed as the complainant's personal data. It drew attention to the fact that the complainant had not explicitly made a request for access under the DPA.
43. The Commissioner would note that a person making a request to a public authority for access to information does not have to specify whether that request is made under the DPA or the FOIA. It is incumbent upon the public authority to determine whether any of the requested information is the personal data of the requester. If it is, the public authority must consider its obligations under the DPA in relation to this element of the requested information.
44. Having considered the withheld information, the Commissioner is satisfied that a small part of the withheld information is exempt from disclosure under the FOIA by virtue of section 40(1). This is because it is the personal data of the requester. This information is specified in a Confidential Annex to this Notice.

Other Matters

45. During the course of the investigation, the Commissioner and the IPO discussed whether certain information was within the scope of the request. The Commissioner concluded that it was not. Specific detail is set out in brief in the Confidential Annex to this Notice.

Right of appeal

46. 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

47. 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.
48. 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

Alexander Ganotis
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