

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2013

Public Authority: Independent Parliamentary Standards Authority
Address: 7th Floor Portland House
Bressenden Place
London
SW1E 5BH

Decision (including any steps ordered)

1. The complainant requested legal advice held by the public authority in relation to the recoupment of capital gains on MPs' second homes following the decision to discontinue the practice of subsidising mortgage interest payments on those properties.
2. The Commissioner's decision is that the public authority was entitled to withhold the legal advice on the basis of section 42(1) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 22 October 2012 the complainant wrote to the public authority and requested information in the following terms:

'When I spoke to [Named Person].....on 5th October 2012, he indicated to me that specific bespoke legal advice had been sought by the Independent Parliamentary Standards Authority (IPSA), in drawing up the rules relating to notional capital gains on Members' properties (i.e. those who were in receipt of mortgage interest subsidy from May 2010 concluding in August 2012, during the transitional period).'

I should be obliged if you would, in the interests of transparency and openness, furnish me a copy of Counsel's advice to which [Named Person] specifically referred, in order that I can satisfy myself that the scheme introduced in some haste by IPSA in May 2010, had and has a sound legal basis? You might also please confirm the reason (as appropriate) if you should choose not to release this document; and further confirm that it is covered under the Freedom of Information Act 2000.

5. The public authority responded on 20 November 2012. It considered that the request was for 'legal advice sought by IPSA in drawing up the rules relating to notional capital gains on Members' properties (i.e. those who were in receipt of mortgage interest subsidy from May 2010 concluding in August 2012).' It informed the complainant that the requested information was exempt from disclosure on the basis of the exemption at section 42(1) FOIA.
6. The complainant requested an internal review on 5 December 2012. The public authority did not respond until 15 May 2013.¹ It upheld the original decision to withhold the requested information on the basis of section 42(1).

Scope of the case

7. On 28 May 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He challenged the application of the exemption on a number of grounds which are addressed further below. He also complained about the length of time it took the public authority to complete its internal review.
8. The substantive scope of the investigation therefore was to determine whether the public authority was entitled to withhold the requested information (the disputed information)² on the basis of the exemption at section 42(1).

¹ The Commissioner has commented on this further below in the 'Other Matters' section.

² Also referred to as 'legal advice' throughout this notice.

Reasons for decision

The Disputed Information

9. By way of background, the public authority explained that until 6 May 2010, MPs were able to claim certain business costs and expenses subject to rules administered by the Department of Resources of the House of Commons. Those rules were set out in the Green Book. Under the Green Book arrangements, MPs could recover accommodation expenses including mortgage interest on second homes.
10. On 21 May 2009, section 3 of the Parliamentary Standards Act 2009 (PSA) came into force and the public authority was established. The public authority is, by virtue of section 5 PSA, responsible for preparing, reviewing from time to time and making payments in accordance with a scheme containing provision for reimbursement of costs and provision for support for MPs sitting in the House of Commons. The public authority's published scheme came into effect on 7 May 2010.
11. The effect of the scheme was that with effect from 7 May 2010, no accommodation expenditure is payable to London Area MPs or those occupying "grace and favour accommodation". The only accommodation expenses payable are rental payments and/or associated expenditure, save that until 31 August 2012, there were exceptional transitional arrangements for MPs who had received sums in respect of mortgage interest under the Green Book arrangements.
12. Paragraph 4.8(d) of the scheme provided that accommodation expenditure could be claimed:

'exceptionally, in the case of MPs receiving payments for mortgage interest on 7 May 2010, continued payment of mortgage interest and associated expenditure....until 31 August 2012 or the date when the MP disposes of his property whichever is the earlier.'
13. Paragraph 4.17 of the scheme provides:

'IPSA may recover the publicly subsidised element of any increase in the value of the property over the period for which mortgage interest payments are claimed.'
14. The disputed information is legal advice that the public authority received in relation to the recoupment of capital gains on MPs second homes from the introduction of the scheme on 7 May 2010 until 31 August 2012 or following the sale of those properties, whichever is sooner (i.e. the transitional period).

Section 42(1)

15. Information is exempt from disclosure on the basis of section 42(1) if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
16. Legal professional privilege may be litigation privilege or advice privilege.
17. 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. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
18. 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 advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies.

Public authority's position

19. The public authority explained that the disputed information consists of confidential opinions provided by its legal adviser which were made solely for the purpose of giving legal advice.
20. The legal advice was at the time of the request, and remains, confidential between the public authority and its legal advisers. The legal advice has not been communicated or disclosed to any third parties. Whilst the existence of the legal advice was revealed to the complainant, its contents were not. Therefore, legal privilege has neither been waived nor lost.
21. The public authority further explained that it no longer considered the legal advice is covered by litigation privilege because in its view, there was no proposed or contemplated litigation at the time the advice was given.

Commissioner's assessment

22. The Commissioner has examined the disputed information and is satisfied that it was provided by a legal adviser to the public authority for the sole purpose of giving legal advice.
23. The Commissioner therefore finds that the disputed information is covered by advice privilege and the exemption at section 42(1) was correctly engaged.

Public Interest Test

24. Section 42(1) is subject to a public interest test. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

Complainant's arguments

25. The complainant has put to the Commissioner a number of public interest arguments in favour of disclosure, summarised in the following four paragraphs.
26. There is an inbuilt presumption in favour of public authorities releasing such information, especially as this public authority is charged with maintaining probity, integrity and transparency in matters relating to public expenditure in relation to MPs.
27. The public authority is a public entity and would not have sought legal advice in any other capacity, rather than say, as a private individual, and such legal advice makes no reference specifically to any individuals in its general sense and the defence of legal professional privilege should be seen within a wider public interest context.
28. As a publicly funded body, accountable to Parliament, the founding principles of the public authority enunciated in 2010 were that it should administer an expenses system which should be *inter alia* '.....open and transparent' and '.....subject to independent audit and assurance.'
29. The administration of the scheme and its fairness and efficacy is a matter of legitimate public concern and can only be properly scrutinised and measured by reference to the legal advice given to the public authority prior to the scheme's commencement in May 2010.

Public authority's arguments

30. The public authority acknowledged that there is a general public interest in transparency and the accountability of the decision-making of public authorities.
31. It pointed out, however, that the general public interest inherent in the exemption is very strong due to the importance of the principle behind legal professional privilege which is to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. It found support for its position in the following comment by the Information Tribunal (now Information Rights Tribunal) in *Szucs v The Information Commissioner* (EA/2011/0072) (*Szucs*):

*'confidentiality is crucial to the effective working of the relationship between lawyer and client, whether the client is a private individual or a public authority. Disclosure of legal advice could lead to prejudice to public authorities in obtaining advice on their legal rights, obligations and liabilities. Regular or routine disclosure of such advice would prejudice the public authority from adopting a more favourable or an alternative position. Advice from solicitors and counsel is of course, a professional opinion on a particular set of facts and circumstances and as such, professional opinions may differ.'*³

32. The public authority therefore argued that it must be able to obtain full and frank legal advice in confidence so that it can be fully informed of what options are available to it and their strengths and weaknesses. Disclosure of the disputed information could prejudice its ability to obtain advice on its legal rights, obligations and liabilities.
33. More specifically, the public authority explained that it relied on the legal advice in designing and operating the relevant part of the scheme relating to mortgage interest subsidy payments on MPs' second homes during the transitional period and the recoupment of capital gains on the relevant properties in that period. The advice was at the time of the request, and remains, live. Although the advice was given in 2010, the public authority continues to rely on it in the current action in the High Court and in the recoupment of capital gains on MPs' second homes.

³ Paragraph 29

34. The public authority disagreed with the complainant that *there is an inbuilt presumption in favour of public authorities in releasing such information*. On the contrary, it submitted that the importance of protecting the principle of legal professional privilege is widely accepted.
35. It also disagreed with the view that because it is a public authority, the legal advice did not carry the same weight as that provided to a private individual. It found support for its position in the Tribunal's comments in *Szucs*; '*confidentiality is crucial to the effective working of the relationship between lawyer and client, whether the client is a private individual or a public authority.*' It also pointed out that legal professional privilege is not a defence (as suggested by the complainant). Rather, it is a set of rules or principles designed to protect the confidentiality of legal communications.
36. The public authority accepted that it should be transparent in how it administers the scheme. However it pointed out that it publishes information on how it makes its decisions, its operational performance and expenditure. It is also subject to independent audit and assurance. It is obliged to keep proper accounting records and for each financial year, prepare accounts in accordance with directions given to it by the Treasury. It is also required to submit accounts to the Comptroller and Auditor General for their examination and certification. Certified copies are required to be laid before each House of Parliament.
37. The public authority also accepted that the administration of the scheme and its fairness and efficacy is a matter of legitimate public concern. However, it did not accept that the administration of the scheme can only be properly scrutinised and measured by reference to the disputed information. It explained that it consults widely and publicly on changes to the scheme. It had also disclosed a significant amount of information regarding the administration of mortgage interest subsidy payments to MPs and, where notional capital gains have been made, their recoupment. Consequently, the disclosure of the disputed information is not necessary for the public to determine the fairness or efficacy of the administration of the scheme.
38. According to the public authority, the disclosure of the disputed information may be of personal interest to the complainant and he may consider that this might assist him in the defence of the claim brought against him by the public authority. However, it did not consider that the complainant's personal interest was a strong factor in the public interest. It found support for its position in *Szucs*, '*.....curiosity as to the legal advice a public authority has received, or the fact that its disclosure may enable the public to better understand the legal*

*argument relevant to the issue concerned, are "weak" factors in favour of disclosure.*⁴

Balance of the public interest

39. The Commissioner agrees that disclosing the disputed information would enhance the transparency of the administration of the scheme, particularly in relation to the recoupment of capital gains on MPs' second homes during the transitional period. It would make the public authority more accountable for how the scheme operates.
40. However the Commissioner also accepts that the inherent public interest in protecting legal professional privilege is especially strong for reasons which have been already mentioned. Therefore, to tip the balance in favour of disclosure, the Commissioner must be satisfied that the factors in favour are at the very least of equal weight to the factors in favour of maintaining the exemption at section 42(1).
41. For the same reasons as the public authority, the Commissioner disagrees with the suggestion by the complainant that the public interest in protecting legal professional privilege is weakened by the fact that legal advice was sought by, and provided to, a public authority.
42. The Commissioner does not agree that the fairness and efficacy of the scheme can *only* be properly scrutinised by reference to the disputed information. In his view, disclosure of the disputed information would be one of a number of ways of supporting scrutiny of the administration of the scheme. The public authority explained that it consults widely and publicly on changes to the scheme and that it has disclosed a significant amount of information to MPs regarding the administration of mortgage interest subsidy payments and recoupment of capital gains.
43. The legal advice was live at the time of the request because the public authority was relying on it to administer the scheme and although there was no real and imminent prospect of litigation (at the time the advice was obtained), it could not be ruled out, given the circumstances. Therefore, in addition to the public interest in protecting live legal advice, it was also possible that any issues relating to the fairness and efficacy of the scheme could have been subjected to legal proceedings in a court of law. There was therefore not only a public interest in protecting live legal advice but also a public interest in ensuring that the

⁴ Paragraph 54

public authority did not undermine its position in the event of a legal challenge as to the fairness and efficacy of the scheme.

44. The Commissioner agrees with the public authority that disclosing the disputed information to assist the complainant in defending the claim against him in the High Court is not a public interest in favour of overriding the maintenance of the principle of legal professional privilege in this case. It is a private interest rather than a public interest.
45. In view of the above, the Commissioner is satisfied that the public interest factors in favour of disclosure are appreciably weaker than those in favour of maintaining legal professional privilege in relation to the disputed information. He consequently finds that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure.

Other matters

46. The FOIA does not stipulate a time limit for public authorities to issue internal reviews. However, as a matter of good practice, the Commissioner considers that a public authority should take no more than 20 working days to issue an internal review and in exceptional circumstances, 40 working days.
47. The Commissioner therefore wishes to record his concern that it took the public authority well over 40 working days to issue the outcome of its internal review to the complainant. He expects the public authority to complete internal reviews of responses to requests for information more promptly in future.

Right of appeal

48. 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

49. 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.
50. 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

Graham Smith
Deputy Commissioner
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