

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2018

Public Authority: Attorney General's Office

Address: 5 – 8 the Sanctuary
London
SW1P 3JS

Decision (including any steps ordered)

1. The complainant has requested information connected to the decision to prosecute the leader and deputy leader of British First, a far right political organisation, for offences contrary to section 1 of the Public Order Act 1936. The public authority withheld the information held within the scope of the request relying on the exemptions at sections 30(1)(a) and 42(1) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 42(1) FOIA.
3. No steps required.

Request and response

4. The complainant submitted a request for information to the public authority on 6 March 2018 in the following terms:

“Public Order Act 1936, section 1(2)

Please email all records held, relating to or concerned with, the decision of A-G to allow the prosecutions of Paul Golding (leader Britain First party) and Jayda Fransen (deputy leader) to proceed.

This must include, but not limited to, legal advice given to the A-G in any form.

This is not exempt as the A-G was never a party to adversarial proceedings. The A-G was not a prosecutor nor defendant.

In the event that this request goes over the cost threshold, then please just supply the Fransen records.”

5. The public authority responded on 28 March 2018. It explained that it considered the request as one for the disclosure of any material held by the Attorney General’s Office in relation to any application for the Attorney General’s consent for an offence contrary to s.1 of the Public Order Act 1936 committed by Jayda Fransen and Paul Golding. It confirmed that the Attorney General’s Office held information relating to 5 applications for the consent of the Attorney General for such an offence. It however considered that information exempt from disclosure on the basis of sections 30(1) and 42(1) FOIA.
6. The complainant requested an internal review on 28 March 2018.
7. The public authority wrote back to the complainant on 26 April 2018 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 26 April 2018 to complain about the way his request for information had been handled, specifically the public authority’s decision to withhold the information it considered exempt from disclosure on the basis of sections 30(1) and 42 FOIA. During the course of the investigation, the public authority clarified that it was relying specifically on the exemption at section 30(1)(a) FOIA.

Reasons for decision

Application of exemptions

Withheld information

9. The withheld information comprises of submissions prepared by legal advisers for the Law Officers (including selected attachments), signed Fiats, correspondence between the Attorney General's Office and the Crown Prosecution Service (CPS) and the CPS' applications for consent.
10. By way of background, Paul Golding is leader of Britain First and its deputy leader is Jayda Fransen. Britain First is a far right political organisation known for campaigning against what it sees as the Islamisation of the UK. Both Paul Golding and Jayda Fransen were convicted and jailed in March 2018 for religiously aggravated harassment.¹

Section 42(1)

11. The Commissioner has first considered the application of the exemption at section 42(1).
12. Section 42 states:

“(1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

Public authority's submissions

13. The public authority's submissions are summarised below.
14. The request was for all material connected to the decision to prosecute Jayda Fransen and Paul Golding for offences contrary to section 1 of the Public Order Act 1936 (POA). The CPS can only prosecute that offence with the consent of the Attorney General or the Solicitor General (the

¹<https://www.bbc.co.uk/news/uk-england-43320121>

Law Officers). In order to obtain consent, a lawyer at the CPS prepares an application which is submitted to the public authority with any supporting evidence that the lawyer considers relevant. Often, the legal adviser to the Law Officers goes back to the CPS to obtain further information or documents to allow them to prepare their advice. Once they have received all of the information, that legal adviser reviews the application and prepares a legal advice, advising the Law Officer on whether the evidential test is met and whether it is in the public interest to prosecute (the submission).

15. The legal adviser will use their judgement and skill to select documents that will assist the Law Officers in deciding whether to grant consent. If consent is granted, the Law Officer will sign a fiat, giving his consent to the CPS to prosecute the offence. The withheld information relates to applications submitted by the CPS to the Attorney General for consent to prosecute Jayda Fransen and Paul Golding for offences contrary to section 1 of the POA.
16. The withheld information is therefore subject to Legal Professional Privilege (LPP) specifically litigation privilege and consequently engages the exemption at section 42(1).
17. With respect to the balance of the public interest, the public authority acknowledged that disclosure of official information encourages greater transparency and accountability. It accepted that in the current political and social climate, the withheld information could be used to inform the public debate on extremism and islamophobia.
18. It however submitted that there is a strong public interest in maintaining LPP. LPP ensures that a client is guaranteed the greatest level of openness to allow for full and frank legal advice, which in turn is fundamental to the administration of justice. The Law Officers need to be able to discuss and debate any investigation or prosecution freely with their legal advisers and prosecuting entities to ensure that they have considered the issues fully. Disclosing the withheld information would undermine the decision-making process. In particular, it would mean that those giving advice would be reluctant to be so frank and candid in providing their views in the future.
19. It further argued that the withheld information is of limited public interest. Two of the applications for consent led to public proceedings in the magistrates' court. The public would have been able to see the evidence and it was reported in several news reports. Given the availability of some of the withheld information, the public interest in disclosure is marginal at best. Moreover, whilst the proceedings are no longer live, there are aspects of the legal advice that will continue to be pertinent to future cases involving offences contrary to section 1 POA.

20. In order to overcome the public interest in maintaining LPP, there must be a countervailing public interest factor that is of at least equal significance. Only in very clear cut cases will the public interest in disclosure outweigh the public interest in protecting the privileged information. The complainant has submitted no clear, compelling or specific justification that equals the public interest in protecting the withheld information, and no such justification exists.

Complainant's submissions

21. The complainant's submissions with respect to the application of section 42(1) are summarised below.
22. The public authority cannot rely on LPP as it is not party to any proceedings. The role of the Attorney General is merely to decide whether the prosecution should proceed.
23. The complainant also provided extracts from an unidentified proceeding, what looks like a publication from the House of Commons Library and a link to a page on the CPS' website entitled "Consents to Prosecute" without explaining how any of these publications support his case.

Commissioner's analysis

24. In the Commissioner's view litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. This type of LPP can only be relied upon in circumstances where the following criteria are met:
 - Where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility.
 - 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.
25. Furthermore, in relation to enclosures or documents attached to communications with a lawyer, the Commissioner considers that any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. The authority must consider each document individually. If an enclosure existed before litigation was contemplated

or before it was considered possible that legal advice might be needed, LPP will not usually apply to it. There is however one important exception to this rule. When a lawyer uses their skill and judgement to select pre-existing documents that weren't already held by the client, for the purposes of advising their client or preparing for litigation, then LPP can apply.

26. In light of the public authority's submissions, the Commissioner accepts that at the time the submissions were prepared by legal advisers for the Law Officers, the CPS was clearly contemplating litigation against Jayda Fransen and Paul Golding for offences contrary to section 1 of the POA. Whether the Attorney General was a party to the subsequent proceedings is not a material consideration with respect to the application of the exemption. The correct question is whether the submissions (including selected enclosures) prepared by legal advisers for the Law Officers is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. Clearly that is the case.
27. The Commissioner therefore finds that the public authority was entitled to engage the exemption at section 42(1).

Balance of the public interest

28. In accordance with the test set out in section 2(2)(b) FOIA, the Commissioner has also considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
29. The public authority's arguments for maintaining the exemption in the public interest are persuasive. Clearly the withheld information would inform the debate on extremism and islamophobia, in particular how the public authority and the CPS weigh up evidence of alleged offences contrary to section 1 of the POA linked to extremism and islamophobia. However, in a representative democracy the courts not the public ultimately decide whether an offence has been committed. Therefore, the public interest in informing the debate on extremism and islamophobia has to be balanced against the public interest in Law Officers and their legal advisers being able to discuss and debate the weight of the evidence under consideration for possible prosecution of individuals/groups in a free and frank manner.
30. As the public authority has argued, LPP ensures that a client is guaranteed the greatest level of openness to allow for full and frank legal advice, which in turn is fundamental to the administration of justice. There is a strong public interest in safeguarding openness in all communications between client and lawyer. There is a strong public

interest in maintaining the exemption in the circumstances of this case because as the public authority has correctly pointed out, the legal advice will continue to be pertinent to future cases involving offences contrary to section 1 POA. It would not be in the public interest if those giving legal advice were reluctant to be as frank and candid in providing their views in the future.

31. The Commissioner acknowledges that the exemption is not absolute. However, she shares the view that at least equally strong countervailing considerations would need to be adduced to override the strong public interest in safeguarding LPP. The Commissioner accepts that the complainant has not submitted clear, compelling or specific justification that equals the public interest in protecting the withheld information.
32. Therefore, she has concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
33. In view of her finding above, the Commissioner has not considered the applicability of the exemption at section 30(1)(a).

Right of appeal

34. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Terna Waya
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