

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2020

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

Decision (including any steps ordered)

1. The complainant requested information, including legal advice, relating to a decision by the then Secretary of State for Justice not issuing, or being a party to, judicial review proceedings.
2. The Ministry of Justice (MoJ) withheld the requested information, citing section 42 (legal professional privilege) of the FOIA.
3. The Commissioner's decision is that the MoJ correctly applied the section 42(1) exemption to the withheld information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. It is accepted that a request for information, one part of which was identical to the request in this case, had been made in March 2018.
6. That request was considered by the Information Commissioner¹ and, on appeal, by the First-tier Tribunal (Information Rights) (the Tribunal). The Tribunal's decision in that case is dated 12 August 2019².

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259897/fs50770390.pdf>

Request and response

7. On 14 August 2019, the complainant wrote to the MoJ and requested information in the following terms:

"I would like to see the legal advice, and all other information, relating to the Sec. of State for Justice not issuing, or being a party to, judicial review proceedings with regard to the decision of the Parole Board with regard to JOHN RADFORD (formerly known as JOHN WORBOYS) – see judicial review case reference [R (DSD and NBV & Ors) [2018] EWHC 694 (Admin) (28 March 2018)

The circumstance have now changed:

Review of the Parole Board Rules and Reconsideration Mechanism complete:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775844/review-of-the-pb-rules-and-rm.pdf

Mr Worboys (Radford) has had his parole hearing:

The legal advice now relates to a 'stale' issue."

8. The MoJ responded on 3 September 2019. It refused to provide the requested information, citing section 42 (legal professional privilege) of the FOIA.
9. Following an internal review, the MoJ wrote to the complainant on 14 October 2019. It maintained its original position.

Scope of the case

10. Following earlier correspondence, the complainant provided the Commissioner with the relevant documentation, on 1 November 2019, to support his complaint about the way his request for information had been handled.
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11. He disputed the application of section 42 in this case on the basis that the circumstances at the time of his request differed from those at the time of the earlier request for the same legal advice.
12. He told the Commissioner:

"This advice is now stale. Should make for an interesting (2nd) appeal to the FTT".
13. The analysis below considers the MoJ's application of section 42 of the FOIA to the requested information.

Reasons for decision

Section 42 - legal professional privilege

14. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
15. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
16. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023) (*Bellamy*) 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 their parties if such communications or exchanges come into being for the purposes of preparing for litigation."
17. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made

between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

18. In this case, the MoJ considered that the information withheld by virtue of section 42(1) is exempt from disclosure because it is subject to advice privilege. The MoJ told the complainant:

"All the information is exempt from disclosure under section 42 of the FOIA – legal professional privilege. Legal professional privilege covers confidential communications between lawyers and their clients. Section 42 ensures that the confidential relationship between lawyer and client is protected.

The information you have requested consists of legal advice provided by a lawyer to the Secretary of State about legal rights, obligations and remedies, it therefore falls under the category of advice privilege as contemplated in Section 42 of the FOIA. The information is confidential and has not being [sic] made available to the public or any third party without restriction".

19. During the course of her investigation, the Commissioner asked the MoJ for further arguments in support of its view regarding disclosure of the requested information. In its submission, the MoJ told the Commissioner:

" ... it is our submission that [the complainant's] contention that ... the information should be disclosed is flawed and not supported in law. The principles relating to the Legal Professional Privilege have been settled by the courts including the Tribunals".

20. In addition to citing *Bellamy* in support of its view, the MoJ told the Commissioner:

"The Court of Appeal in a recent decision put to rest and took a robust stance against an attempt to retrospectively redraw the boundaries of legal professional privilege in Lee Victor Addlesee and others v Dentons Europe LLP [2019] EWCA Civ 1600".

Is the exemption engaged?

21. Having had the benefit of viewing the information withheld by virtue of section 42, the Commissioner is satisfied that it constitutes communications between a lawyer and their client and that it clearly relates to legal matters. She is also satisfied that the communications were made for the dominant (main) purpose of seeking or giving legal advice.

22. Having established that the requested information falls within the definition of LPP, the next matter for the Commissioner to consider is whether privilege has been lost or waived.
23. The Commissioner regards the key to deciding whether the right to claim LPP has been lost will be to consider whether previous disclosures to the world at large mean that the information can no longer be said to be confidential.
24. The Commissioner is mindful that there was a Ministerial Statement regarding the Worboys judicial review. She acknowledges that the Tribunal addressed the question of whether that Statement waived LPP. In that respect, the Tribunal said:

"On the question of whether the Ministerial Statement waived the legal professional privilege originally attached to the legal advice, this is a question of fact to be determined on the evidence before us. We have read the advice and we have read the Ministerial Statement. Having regard to the appropriate legal test, we conclude that the Statement referred to the existence of the legal advice but did not disclose its contents. We are not persuaded that the Minister waived legal professional privilege in making the Statement".

25. While accepting that time has passed since the Tribunal considered the matter, the Commissioner is not aware of any disclosure of the information under consideration to the world at large. Nor has the complainant put forward any arguments claiming that privilege has been lost or waived.
26. She therefore finds that section 42 is engaged in respect of the withheld information.

The public interest test

27. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
28. The Commissioner's guidance³ on the public interest test states:

³ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

"In carrying out the public interest test the authority should consider the circumstances at the time at which it deals with the request. If carrying out an internal review, it may consider the circumstances up to the point that review is completed".

29. The Commissioner accepts that, with regard to the previous request for the legal advice, the public interest was considered with regard to the circumstances in July 2018.
30. In this case, the circumstances to be considered when carrying out the public interest test are those at the time at which the MoJ completed its review, namely October 2019.

Public interest arguments in favour of disclosing the requested information

31. The complainant considers that the requested advice should be disclosed due to the passage of time.
32. The MoJ recognised the general interest in promoting transparency, accountability, public understanding and involvement in the democratic process.
33. It also acknowledged, in its correspondence with the complainant:

"Worboys' was a high-profile and concerning case. This may increase the public interest in disclosing the material.

There is a public interest in presenting a 'full picture' to remove any suspicion of manipulating the facts, or 'spin'".

34. However, with regard to the public interest factors in favour of disclosure, it told the complainant:

"The 'full picture' has already been independently and openly revealed through the judicial review process brought by the victims of Worboys, the Mayor of London and News Group Newspapers Ltd. It has also been revealed through Dame Glenys Stacey's report on the ways in which victims were contacted as part of the Parole Board's initial decision to release Worboys".

35. It also referred him to the Ministerial Statement, saying:

"As to the 'full picture' of the legal advice in particular, the then Secretary of State for Justice accurately shared the conclusion of the advice with the House of Commons while withholding the substance of the advice itself".

36. The MoJ argued that the actions taken "serve to satisfy (at least in part)" any public interest in the disclosure of the information that has been requested.

Public interest arguments in favour of maintaining the exemption

37. In its internal review correspondence, the MoJ acknowledged the complainant's reasons "for requesting the information afresh", noting his reference to the parole hearing having concluded and that new Parole Board Rules had come into force.

38. In its refusal dated 3 September 2019, the MoJ argued:

"The confidentiality of material subject to legal privilege between lawyers and their clients carries with it substantial public interest. There is significant interest in maintaining legal privilege due to the importance of the principle behind it. Namely, safeguarding 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".

39. Regarding the complainant's view that the legal advice is no longer live, and with reference to its refusal correspondence, the MoJ told the complainant:

"The previous response addressed the age of the information. It acknowledged that while the passage of time is a legitimate factor in determining public interest, a number of years would normally have to pass before legally privileged information will become less sensitive. It concluded that although matters have moved on, the case is still comparatively recent and there is no clear or compelling arguments that outweighs the public interest in protecting the Government's ability to receive confidential legal advice".

40. In its submission to the Commissioner, the MoJ re-iterated what it had told the complainant with regard to his view that the issue is now 'stale'. For example, it explained:

"In the instant case, even though the issue in the legal advice is no longer live, it is still considered recent and current, and there is no exceptional public interest in the matter warranting disclosure of the information. There is not any clear, compelling and specific justification that at least equals the public interest in protecting the information".

Balance of the public interest arguments

41. In her guidance on section 42⁴, the Commissioner describes LPP as 'a fundamental principle of English law'.

42. Of relevance in this case, the Commissioner's guidance on the public interest test states:

"As a general rule there is no inherent public interest in class based exemptions. However, there is an inherent public interest in section 42, which exempts legally privileged information. This is because of the importance of the principle of legal privilege; disclosing any legally privileged information threatens that principle".

43. Similarly, her guidance on section 42 states:

"The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding 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".

44. In *Bellamy* the principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the information sought. Explaining the balance of factors to consider when assessing the public interest test, it said:

"... there is strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".

45. In balancing the opposing public interest factors under section 42 in this case, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration

⁴ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

of justice and disclosing any legally privileged information threatens that principle.

46. Although she considers there will always be an initial weighting towards maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
47. In accordance with her guidance on section 42, the Commissioner considers the factors in favour of disclosure include the assumption in favour of disclosure and the rationale behind the assumption (ie accountability, transparency, furthering public debate etc).
48. She recognises that additional weight may be added to the above factors in favour of disclosure if the following issues are relevant in the particular case:
 - a large amount of money is involved;
 - whether or not a significant group of people are affected by the advice or resulting decision;
 - lack of transparency in the public authority's actions;
 - misrepresentation of advice that was given;
 - selective disclosure of only part of advice that was given.
49. The Commissioner recognises that it is also important to take into account the significance of the actual information and what it reveals. In that respect she notes the MoJ's argument:

"It is not clear that disclosing the information requested would increase public understanding or inform debate beyond what is already in the public domain. In particular, the principal public interest is contained in the conclusion of the advice (which has already been accurately and fully shared) rather than the reasoning".

Conclusion

50. In reaching a conclusion in this case, the Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.
51. In reaching her decision, the Commissioner has considered the arguments put forward by the complainant and the stated position of

the MoJ. She has also considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.

52. In weighing the competing interests in this case, she has had regard to the content of the withheld information, the age of the advice and the amount of information about the Worboys case that was already in the public domain at the time of the MoJ's internal review. She has also considered the nature of the public interest identified.
53. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions. However, she must also take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.
54. In all the circumstances of this case, the Commissioner does not consider that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.
55. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of the FOIA for legal advice privilege has been correctly applied.

Right of appeal

56. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.

58. 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
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