

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2022

Public Authority: Attorney General's Office
Address: 102 Petty France
London
SW1H 9EA
United Kingdom

Decision (including any steps ordered)

1. The complainant requested information relating to a decision to consent to prosecute.
2. The Attorney General's Office (AGO) confirmed it held relevant information but refused to disclose it, citing section 42 (legal professional privilege) of FOIA.
3. The Commissioner's decision is that the AGO correctly applied section 42(1) of FOIA to the withheld information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. Some offences cannot be prosecuted without the agreement of the Attorney General. These are called 'Attorney General consent cases' and consent can be given by either the Attorney General or the Solicitor General (known as the Law Officers)¹.

¹ <https://www.gov.uk/guidance/consent-of-the-attorney-general-to-prosecute-how-to-apply>

Request and response

6. On 30 January 2021, the complainant wrote to the AGO and requested information in the following terms:

"Please disclose all the materials sent to you in summer 2017 in the case of R v Thacker and others (Stansted 15 case), on which you based your consent to amend the charge to s1(2) (b) of the AMSA [Aviation and Maritime Security Act] 1990".
7. The request was made via the 'whatdotheyknow' website.
8. The AGO responded on 19 February 2021. It confirmed it holds information within the scope of the request. However, it refused to provide that information, citing section 42 (legal professional privilege) of FOIA.
9. The complainant requested an internal review, arguing that legal privilege does not apply in this context.
10. Following an internal review, the AGO wrote to the complainant on 12 March 2021 maintaining its original position. It additionally drew the complainant's attention to sections 30(1)(a) (investigations and proceedings) and 31(1)(c) (law enforcement) of FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 11 April 2021 to complain about the way her request for information had been handled.
 12. She disputed the AGO's application of section 42 and argued that the public interest in disclosure of the requested information was high.
 13. She also disputed that sections 30 and 31 of FOIA were relevant in this case.
 14. In correspondence with the complainant, the AGO confirmed it holds:

"... an application submitted by the Crown Prosecution Service in 2017 seeking the Attorney General's consent to prosecute in R v Thacker and others".
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15. It subsequently clarified that the information comprised the Crown Prosecution Service (CPS) application document itself and supporting documentation.
16. The Commissioner acknowledges that, in her submission to him, the complainant explained her interest in this information being disclosed. By way of background to the request, she told the Commissioner that the Stansted 15 were initially charged with Aggravated Trespass, but that the charge was subsequently changed to one of breach of section 1(2)(b) of AMSA, a terror-related offence.
17. It is not within the Commissioner's remit in this case to comment on whether it was appropriate to apply for the Attorney General's consent to prosecute, or whether it was appropriate for consent to be granted. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA.
18. During the course of the Commissioner's investigation, the AGO confirmed its application of section 42 to the withheld information, a copy of which it provided to the Commissioner.
19. The analysis below considers the AGO's application of section 42(1) of FOIA to the requested information.

Reasons for decision

Section 42 - legal professional privilege

20. Section 42(1) of 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.
21. 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.
22. 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.”

23. 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.
24. In its correspondence with the complainant, the AGO told her that it considered that the information withheld by virtue of section 42(1) is exempt from disclosure because it is subject to both legal advice privilege and litigation privilege.
25. In its submission to the Commissioner, the AGO said:

“The primary argument submitted is that all the documents are exempt because they attract litigation privilege”.

Is the exemption engaged?

The complainant's view

26. The complainant considers that neither legal advice privilege nor litigation privilege is applicable in this case.
27. With respect to legal advice privilege, she argued that there is no lawyer-client relationship between the CPS and the AG. She also disputed that litigation privilege applies, telling the Commissioner:

“- Litigation privilege: this does not apply. Legal professional privilege 'belongs' to a client - the Attorney General is not a client”.

The AGO's view

28. By way of addressing her concerns about its application of section 42 in this case, the AGO explained to the complainant:

“... the offence contrary to section 1(2)(b) of the Aviation and Maritime Security Act 1990 provides that proceedings shall not be

instituted without the consent of the Attorney General. Section 25(2) of the Prosecution of Offences Act 1985 provides that a suspect can be arrested and charged with an offence requiring consent and a remand decision taken without consent. However, any subsequent proceedings will be rendered a nullity if consent is not obtained. Therefore, the Law Officers become involved when there is a reasonable prospect of criminal proceedings being instituted and play an integral role in the decision as to whether to institute proceedings”.

29. Specifically, in respect of its view that litigation privilege applies, the AGO told the complainant:

“I have reviewed the documents sent by the CPS to the AGO, in which they sought consent to prosecute, and which went before a Law Officer. These comprised the CPS application document itself and supporting documentation. These documents were confidential communications from the CPS to the AGO, communicating why consent was sought for a prosecution: the CPS assessment and analysis of the evidential and public interest principles which fell to be determined. The documents were created and communicated in contemplation of a prosecution should the Attorney’s consent be granted. I have therefore concluded that the documents are covered by litigation privilege”.

30. In its submission to the Commissioner, the AGO acknowledged that litigation privilege is traditionally claimed by parties to proceedings. However, citing a decision from the High Court, it told the Commissioner:

“...but [litigation privilege] can be claimed by parties who are “involved” in the proceedings (USA v Philip Morris [2003] EWHC 3028)”.

31. With reference to the request in this case, the AGO told the Commissioner:

“Whilst the Attorney General (AG) was not a party [to the criminal proceedings], he granted consent to the prosecution, which amounted to being involved in the proceedings”.

32. The AGO cited a previous FTT decision² in support of its position, telling the Commissioner:

“This related to a request for material provided by the CPS for consent to prosecute. The tribunal accepted that the material was subject to litigation privilege [paragraph 38 of the decision]”.

33. Acknowledging the complainant’s views in this matter, the Commissioner sought further clarification from the AGO regarding the client/lawyer relationship in this case.
34. The AGO confirmed that, in this case, the CPS is the legal advisor and the AG the client.
35. The AGO explained that, in the context of a request for consent to prosecute, the AG is the client as he relies upon legal advice from his own legal advisers and the CPS in making those decisions.

The Commissioner’s position

36. Mindful of the AGO’s primary argument being that all the documents are exempt because they attract litigation privilege, the Commissioner has considered whether litigation privilege applies to the withheld information.
37. The Commissioner’s guidance on section 42³ describes litigation privilege as follows:

“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

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2536/Williams,Edward%20EA-2018-0177%20\(30.10.19\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2536/Williams,Edward%20EA-2018-0177%20(30.10.19).pdf)

³ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation”.

38. The Commissioner accepts that litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.
39. In this case the withheld information comprises the documents sent by the CPS to the AGO, in which they sought consent to prosecute. The documents were created and communicated in contemplation of a prosecution should the AG’s consent be granted.
40. The Commissioner recognises that the rationale for the communications was to seek consent to prosecute. He is satisfied that the communications were confidential and were made for the dominant purpose of providing or obtaining legal advice in the context of litigation that was proposed or contemplated.
41. With respect to whether the communications were made between a client and professional legal adviser acting in their professional capacity the Commissioner has taken into account the FTT decision cited by the AGO.
42. The Commissioner acknowledges that a FTT ruling is not a binding decision. He nevertheless accepts that the circumstances of this case are sufficiently similar for him to find that the withheld communications attract litigation privilege.
43. 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.
44. 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.
45. In this case, 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.
46. Therefore he finds that section 42 is engaged in respect of the withheld information.

The public interest test

47. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of 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.

Public interest arguments in favour of disclosing the requested information

48. The complainant did not put forward any public interest arguments in her correspondence with the AGO. She did, however, put forward a number of public interest arguments in her submission to the Commissioner.
49. For example, she considers that it is in the public interest to know why the initial charge was changed. She also cited the cost to the public purse of proceedings relating to the new charge.
50. The Commissioner recognises that the complainant explained their personal interest in disclosure of the withheld information.
51. The AGO acknowledged the public interest in understanding a decision to prosecute and the importance of transparency given the nature and consequences of that decision.

Public interest arguments in favour of maintaining the exemption

52. The Commissioner considers that the AGO's arguments in favour of maintaining the exemption were that the other actions taken satisfy any public interest in disclosure. In that respect it told the complainant:

"In this case, the decision to prosecute and moreover what the evidence was to support the charges was explored in detail in the trial and the appeal. The Court of Appeal has confirmed the legal position and the error(s) which led it to uphold the appeal. In other words, why the prosecution considered the various elements of the offence were met and why that was an error has been considered in the trial and at appeal and has now been ruled upon and is set out in the judgment. All of that information either took place in public (the trial and appeal hearings) or was published and is therefore in the public domain (the judgment)".

53. The Commissioner acknowledges that the AGO told the complainant that public interest and debate about the proceedings was enabled as the prosecutions were conducted in public. It also noted that proceedings were widely reported in the press. It told the complainant:

“Given the availability and accessibility of this material, the public interest in disclosing the requested material is marginal. Whilst the AGO acknowledges the public interest in transparency and accountability, we do not consider that these outweigh the arguments in favour of maintaining the exemption”.

54. In its submission to the Commissioner, while acknowledging the public interest in disclosure, the AGO nevertheless argued:

“Set against that, the public interest which legal professional privilege protects is the full, candid and uninhibited assessment of the legal position where adversarial legal proceedings are contemplated”.

55. With respect to the confidential nature of such communications, it also argued:

“It would be damaging to the relationship between the AGO and the CPS and the process by which consent is sought if those communications were less full, candid, or uninhibited because they could not be conducted with an expectation of confidence”.

56. In its submission to the Commissioner, the AGO reiterated what it had told the complainant – namely that the decision to prosecute and what the evidence was to support the charges was explored in detail in the trial and the appeal.

57. It argued strongly that the administration of justice relies upon the expectation that the confidentiality of legal communications will be upheld. In its submission, the AGO also quoted paragraph 42 in ‘Edward Williams v ICO and AGO’ in support of its view that the public interest favours maintaining the exemption.

Balance of the public interest arguments

58. In his guidance on section 42, the Commissioner describes LPP as ‘a fundamental principle of English law’.

59. Of relevance in this case, the Commissioner’s guidance⁴ on the public interest test states:

⁴ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

"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".

60. Similarly, his guidance on the section 42 exemption 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".

61. The 'in-built' public interest in non-disclosure which comes with section 42 does not take away the fact that the exemption remains a qualified exemption.

62. 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".

63. The Commissioner recognises that each case must be considered on its own merits and the public interest for and against disclosure considered in each case.

64. The Commissioner accepts that the disputed information in this case is very specific, relating as it does to the consent of the AG to prosecute in particular proceedings. He acknowledges the significance of the decision as to whether or not to institute proceedings.

65. The Commissioner recognises the factors in favour of disclosure, namely accountability, transparency and informing public debate. He also recognises the complainant's personal interest in disclosure.

66. The Commissioner accepts that there is a public interest in disclosing information that enhances transparency and allows scrutiny of a public authority's role. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.

67. On the other hand, he also gives weight to the arguments put forward by the AGO in favour of maintaining the exemption, namely the need for full frankness and confidentiality in communications between client and lawyer.
68. He is mindful of the nature of the requested information, namely communications relating to seeking the Attorney General's consent. He also recognises that the Courts have pronounced judgment in the subsequent proceedings.
69. In balancing the opposing public interest factors in this case, the Commissioner acknowledges that the in-built public interest in non-disclosure, that is the public interest in the maintenance of LPP, itself carries significant weight.
70. This derives not only from the need to safeguard the confidentiality of legal advice in a specific case but also from a more generalised need to safeguard the efficacy of the system of LPP, which the effectiveness and fairness of the administration of justice as a whole is reliant on.

Conclusion

71. 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.
72. The Commissioner has considered the specific public interest arguments put forward by the complainant as well as the general arguments that favour disclosure. The Commissioner has also considered the stated position of the AGO. He has had regard to the content of the withheld information.
73. In reaching his decision, the Commissioner has taken into account the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.
74. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. He gives weight to those arguments.
75. However, he 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. These long-established rules exist to ensure people are confident they can be completely frank and candid

with their legal adviser when obtaining legal advice, without fear of disclosure.

76. While the Commissioner appreciates that the complainant has put forward clear and specific arguments in favour of disclosure, he is not satisfied that they override the strong public interest in safeguarding LPP.
77. Therefore, he 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.
78. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of FOIA for litigation privilege has been correctly applied.

Other matters

79. The Commissioner recognises that while the AGO drew the complainant's attention to other exemptions, namely sections 30(1)(a) (investigations and proceedings) and section 31(1)(c) (law enforcement) of FOIA, it did not rely on them. Similarly, while it told the Commissioner it had considered those other exemptions it did not rely on them in its submission to the Commissioner.
80. Accordingly, the Commissioner has not considered them in this decision notice.

Right of appeal

81. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

82. 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.

83. 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

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