

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 31 July 2023

**Public Authority:** Government Legal Department  
**Address:** 102 Petty France  
London  
SW1H 9GL

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to judicial review proceedings. Government Legal Department (GLD) denied holding some of the requested information. It confirmed it held the remaining information within the scope of the request but refused to provide it, citing section 42(1) (legal professional privilege) of FOIA.
2. The Commissioner's decision is that GLD is entitled to rely on section 42(1) of FOIA to withhold the requested information in scope of parts 2-4 of the request.
3. He also found that, on the balance of probabilities, GLD does not hold information within the scope of part 1 of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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5. Following earlier correspondence, on 1 February 2023, the complainant wrote to GLD and requested information in the following terms:

"It is our understanding that [...] we should have received the response from interested parties to our initial pre-application letter. [...]"

So, on behalf of [redacted 1], I am writing to you under the Freedom of Information Act 2000 to request the following information from your activities within the government legal team

on issues pertaining to this case: Please supply me with the following:

1. All responses and exchanges (letters, phone communications and emails) of the 'interested parties' and their representatives to the initial application letter.
2. All exchanges arising within your department from the pre-application process letter sent by [redacted 1] to your department regarding the [Appeal decision], including all internal correspondence between you and others in your department.
3. All exchanges between yourself, other legal representatives in the department and officers and members of the Department for Levelling up
4. All correspondence (emails, letters and digital communications) between you, your department and the Planning Inspectorate on this case.

This is now an FOI request in its own right. You are a public body, and we are entitled to understand the input made by all parties, including [redacted 2] and [redacted 3] in the pre-application process and your exchanges with them and others in your department and elsewhere within the government. For the avoidance of doubt, I am requesting ALL forms of recorded communication, which includes all emails, letters, memos, WhatsApp and text messages”.

6. GLD responded on 2 March 2023. It denied holding information in scope of part 1 of the request. While it confirmed that it held information in scope of parts 2-4, it refused to provide that information, citing section 42(1) (legal professional privilege) of FOIA.
7. Following an internal review, GLD wrote to the complainant on 31 March 2023 maintaining its position.

### **Scope of the case**

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8. The complainant disputes GLD’s application of section 42(1) to the information withheld by virtue of that exemption. They also dispute that GLD does not hold information in scope of part 1 of the request.
9. During the course of the Commissioner’s investigation, GLD disclosed some of the withheld information to the complainant, redacted to avoid disclosure of personal information. It confirmed its application of section

42 to the remaining withheld information. GLD also confirmed that it does not hold information within the scope of part 1.

10. The complainant remained dissatisfied.
11. The following analysis explains why the Commissioner is satisfied that GLD was entitled to apply section 42(1) to withhold the remaining information in scope of parts 2-4 of the request.
12. It also explains why he is satisfied that, on the balance of probabilities, GLD does not hold information within the scope of part 1 of the request.

## **Reasons for decision**

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### **Section 42 legal professional privilege**

13. 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. LPP protects the confidentiality of communications between a lawyer and client.
14. 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.
15. 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."
16. 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.

17. The requested information in this case relates to a Judicial review of a decision by the Planning Inspectorate.
18. GLD is relying on the withheld information being subject to litigation privilege. It told the Commissioner that the request "related to litigation that was anticipated, subsequently commenced and is now complete".
19. In correspondence with the complainant, GLD described the withheld information as follows:

"This information contains communications between lawyers within the legal team and between those lawyers and their clients in the course of litigation that are capable of protection under legal professional privilege".

20. It confirmed that all communications held by GLD in respect of advice given by GLD were made by practicing lawyers and that communications from DLUHC [Department for Levelling Up, Housing and Communities] to GLD were made for the purpose of obtaining legal advice in relation to the litigation.
21. From the evidence he has seen, the Commissioner is satisfied that the withheld information falls within the definition of LPP. The Commissioner is not aware of any evidence suggesting that this privilege has been waived. The exemption provided by section 42(1) of FOIA is, therefore, engaged.

### **Public interest test**

22. Section 42 is a qualified exemption and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exemption being maintained.

### **Public interest arguments in favour of disclosure**

23. The complainant told GLD that public interest and concern in this case "are exceptionally high". They consider that the public have the right to understand what discussions took place in response to the first stage pre-application letter.

24. GLD recognises that openness in government may increase public trust in, and engagement with, the government.
25. It also accepted that disclosure could serve to further understanding of government processes in decision making.

### **Public interest arguments in favour of maintaining the exemption**

26. Arguing in favour of maintaining the exemption, GLD recognised that the concept of LPP reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients.
27. It considers that without this confidentiality, clients might be deterred from seeking legal advice at all, or from disclosing relevant material to their lawyers.
28. Describing the requested information as “information that directly concerns the conduct of pre-action litigation”, GLD considers it is an archetypal example of information that is covered by LPP and consequently, the general public interest in protecting legal privilege applies to its fullest extent.
29. Mindful of the wording of the request, and the nature of the withheld information, GLD told the complainant it has taken into account that the withheld information does not concern the substance of the decision in the appeal matters:  

“... but is limited to information about GLD’s activities in responding to your pre-action letter in respect of that appeal”.
30. GLD does not consider there to be a particular or specific public interest in information relating to the handling of that pre-action correspondence.

### **Balance of the public interest**

31. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege.
32. 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.

33. The Tribunal explained the balance of factors to consider when assessing the PIT in Bellamy:

“There is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.”
34. The Commissioner acknowledges the complainant’s argument that there is a public interest in ensuring that public authorities are transparent in their actions. The Commissioner has also taken into account the complainant’s argument about the number of concerned local residents.
35. 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.
36. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. He has also had regard to the content of the withheld information.
37. 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.
38. In all the circumstances of this case, however, the Commissioner is not satisfied, from the evidence he has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.
39. The Commissioner has therefore concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. It follows that GLD correctly applied section 42(1) in this case.

### **Section 1 general right of access to information**

40. Section 1 of FOIA states that:

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him”.

41. The complainant disputes that GLD does not hold information in scope of part 1 of the request.
42. The Commissioner understands that the complainant believes that some exchanges between parties have been withheld. In their view, the department concerned would have notified and shared the pre-application letter with other interested parties “and they would have responded in some way”.
43. In correspondence with the Commissioner, GLD stated that it has “robust methods for searching and extracting information that it holds”. It explained that searches and extractions are conducted by dedicated ‘knowledge and information management’ teams, who work closely with its FOI Team, and have access to all relevant and necessary databases.
44. GLD explained its role to the Commissioner, namely to provide legal services to its clients, the government departments. It told him:

“As part of these services, government departments may share information with GLD to enable us to provide these services”.
45. Regarding the activities it has undertaken in order to determine whether or not it holds information in scope of part 1 of the request, GLD told the Commissioner:

“GLD conducted complete and extensive searches for relevant information across our Case Management System (where our case related information is held), Outlook (for email correspondence) and personal drives of the lawyers involved”.
46. Having conducted a further search following the Commissioner’s intervention, it maintained its position that no information is held.

### **The Commissioner’s view**

47. In scenarios such as this, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
48. The Commissioner acknowledges that GLD’s role is to provide legal services to its clients and that, as such, it only obtains information from its clients that the clients choose to provide to GLD as part of the legal services process.

49. Based on the evidence provided to him, the Commissioner is satisfied that, on the balance of probabilities, GLD does not hold information falling within the scope of part 1 of the request.
50. He is therefore satisfied that GLD complied with the requirements of section 1(1) of FOIA in this case.



## Right of appeal

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51. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**