

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 29 March 2007

Public Authority: Department for Work and Pensions
Address: Caxton House
Tothill Street
London
SW1H 9DA

Summary

The complainant made Freedom of Information (FOI) requests to The Rent Service (TRS), an executive agency of the Department for Work and Pensions (DWP), asking for correspondence and minutes of meetings between the DWP and TRS relating to the determination of 'localities'. Much of the information held by TRS in relation to the requests was withheld under section 35(1)(a) (formulation of government policy) and section 42(1) (legal professional privilege) of the Act.

Following intervention by the Commissioner, TRS supplied a number of previously withheld documents to the complainant but maintained that the remaining information was exempt from disclosure under the aforementioned sections. The Commissioner has decided that section 42(1) applies to all the remaining withheld information, with the balance of the public interest favouring the maintenance of that exemption. He therefore did not consider the application of section 35(1)(a).

The Commissioner's Role

1. 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 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 23 May 2005, the complainant asked TRS for "correspondence and minutes of meetings between the DWP and TRS relating to determining 'localities' between 1.12.00 and 31.11.01."
3. In its refusal notice of 22 June 2005, TRS withheld the requested information

under section 35(1)(a) (formulation of government policy) and section 42(1) (legal professional privilege) of the Act.

4. The complainant requested an internal review of TRS' decision on 22 June 2005. Following the conclusion of this review, three documents were released to the complainant on 15 July 2005. They consisted of:

- An internal circular referred to DWP for information, containing guidance which has since been superseded.
- Notes of an inter-departmental meeting.
- An email to various members of staff in DWP and TRS relating to media relations following a legal case about localities.

The remainder of the information, referred to as 'a few other documents', continued to be withheld under the aforementioned exemptions.

5. On 29 July 2005, the complainant asked TRS for 'correspondence and minutes of meetings between the DWP and TRS relating to determining 'localities' between 1.12.99 and 30.11.00.'
6. TRS wrote to the complainant on 9 August 2005, stating that the cost of compliance with the request would exceed the appropriate limit but nevertheless agreed to carry out the work required. However, it informed the complainant that this would take longer than 20 working days. The complainant accepted this response.
7. On 14 October 2005, TRS provided a substantive response to the request of 29 July 2005. Two references to locality in minutes of meetings between TRS and the Department of Social Security (predecessor body to DWP) were released to the complainant. Three other passing references to locality in minutes from this period were withheld under section 42(1) and section 35(1)(a).
8. On 19 January 2006, the Complainant requested an internal review of the decision of 14 October 2005. (TRS claimed not to have received an earlier request for internal review submitted by the complainant in October 2005.) TRS replied on 20 January 2006, upholding its original decision in relation to the complainant's request of 29 July 2005.

The Investigation

Scope of the case

9. On 29 July 2005 the complainant contacted the Commissioner to appeal against the decision of TRS to withhold the remaining information in response to his request of 23 May 2005.

10. On 7 January 2006 the complainant contacted the Commissioner to appeal against the decision of TRS to withhold the remaining information in response to his request of 29 July 2005.
11. Although the complainant submitted his two requests and associated appeals separately, the Commissioner decided to investigate them as one complaint. This is because all the information requested originated within the broader scope of a previous request made by the complainant to TRS on 13 January 2005. This initial request was narrowed by the complainant as a result of TRS' claim that complying with that request in its original form would exceed the fees limit of £600 under section 12 of the Act. This response led to the submission of the complainant's two subsequent requests which are the subject of the Commissioner's decision in this case.
12. The complainant does not wish to appeal against the decision regarding his request of 13 January 2005. The Commissioner therefore decided to disregard for the purposes of his investigation whether TRS correctly applied the Act in relation to that initial request. Therefore the Commissioner's review initially focused on whether TRS correctly applied both section 35(1)(a) and 42(1) of the Act as a basis for withholding the information not disclosed to the complainant as a result of his requests of 23 May and 29 July 2005.
13. However, during the course of the Commissioner's investigation and following intervention by the Commissioner, some of the remaining withheld information was released to the complainant. Therefore the Commissioner decided to restrict his review to whether TRS was correct to withhold the remaining information which TRS continues to refuse to supply to the complainant.

Chronology

14. On 3 August 2006 the Commissioner contacted TRS to ask for further, more detailed justification of its application of both section 35(1)(a) and 42(1), and full, unredacted copies of the information withheld from the complainant.
15. DWP (as the 'public authority' for the purposes of the Act) furnished the Commissioner with all the information he requested on 29 September 2006. Fourteen documents were supplied, comprising all the information originally withheld.
16. DWP also stated in its letter of 29 September 2006 that it had re-considered its decision in the light of the Commissioner's letter of 3 August 2006 and the passage of time since the original decisions were made. It consequently agreed to release a further seven documents of those that were withheld until that point. The summary details of each of these documents are as follows:
 - Extract from Minutes of the "Tripartite Meeting" involving DETR, DSS and TRS, held on 27 September 2000.
 - Further extract from the Minutes from the "Tripartite Meeting" of 27 September 2000. Discussion re TRS 'Locality' paper. First paragraph of this extract has already been released to Shelter.

- Extract from the Minutes of the “Tripartite Meeting” involving DETR, DSS and TRS, held on 24 May 2000. Discussion on “Codification”.
 - Fax copy of amending regulations from DWP to TRS. Handwritten TRS notes on the draft regulations.
 - Extract from email exchange between officials at DWP and TRS.
 - DWP submission to Minister (Malcolm Wicks MP) re “Legal Challenges to The Rent Service”, copied to TRS (covering e-mail from DWP to TRS.)
 - Email exchanges between DWP and TRS officials re timetable for legislative amendments to the definition of “locality”.
17. TRS supplied the seven documents to the complainant on 13 October 2006, together with further justification as to why the remaining information, in its opinion, remains exempt under sections 35(1)(a) and 42(1). The Commissioner welcomes this voluntary disclosure of previously withheld information. He was also satisfied that this material was different in nature to the information which continues to be withheld from the complainant.
18. Following receipt of the newly released documents, the Commissioner asked the complainant to consider whether he wished to withdraw his complaint or whether he wished to continue his appeal on the basis of TRS’ decision to withhold the remaining information. On 17 October 2006, the complainant confirmed to the Commissioner that he believed the information that was released to him was innocuous and did not shed any further light on the issues in which he had an interest. He therefore informed the Commissioner that he wished to proceed with his appeal on the grounds that he felt that the substantial information held by TRS had still not been provided.
19. DWP (acting on behalf of TRS) confirmed to the Commissioner on 17 October 2006 that it would not consider releasing any of the remaining information withheld. The Commissioner therefore agreed to make a decision on the matter without the need for further representations from either party.

Findings of fact

20. In conducting his analysis, the Commissioner established the exact nature of the information withheld and considered the arguments presented by both TRS and Shelter. The Commissioner also established the meaning of ‘localities’. In particular the Commissioner understands that a ‘locality’ is an area determined by TRS for the purposes of setting the value of the local reference rent. This establishes the highest level of housing benefit to which tenants who rent housing in that area are entitled.

Analysis

21. The Commissioner undertook an assessment of the content and context of the information withheld, in conjunction with TRS’ reasoning for withholding the information. The Commissioner also compared the information withheld against that previously released to the complainant.

22. The information which continues to be withheld consists of seven documents incorporating:
 - Notes of Conferences with Counsel
 - Legal advice
 - Instructions to lawyers to provide legal advice
 - Submission to internal lawyers
 - Email regarding draft amendments to regulations extracted from a copy of instructions to lawyers
 - Memorandum from lawyers advising on amendments to regulations.
23. The provisions of sections 35 and 42 can be found in the legal annex to this Notice.
24. For either sections 35(1)(a) or 42(1) to apply, the public interest test must be considered. This test is set out in section 2(2)(b) of the Act and states that the obligation to disclose information under section 1(1)(b) does not apply if or to the extent that “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”
25. In assessing the contents of all the documents withheld from the complainant, the Commissioner considered all the information to fall within the scope of the section 42(1) exemption. The Commissioner did not therefore consider the application of 35(1)(a) and instead focused solely upon the application of section 42(1).
26. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI*) 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 communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
27. There are two types of privilege – legal advice privilege and litigation privilege. In these 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. Communications made between adviser and client in a relevant legal context will attract privilege. 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.
28. DWP stated in its submission to the Commissioner of 29 September 2006 that legal advice contained within the withheld documents was sought when it was clear that an appellant had been granted leave to appeal to the Court of Appeal regarding the legislation determining the definition of a ‘locality’. The legal advice contained within the withheld documents therefore also related to current legal proceedings. The Commissioner additionally noted that legislation relating to

localities was again being reviewed by the Government at the time of the complainant's requests. On the basis of the above, and having reviewed the information withheld, the Commissioner is satisfied that a claim to legal professional privilege could be maintained in legal proceedings and therefore that the information withheld falls within the scope of section 42.

29. Having reviewed the information previously supplied to the complainant, the Commissioner does not consider TRS to have waived its claim to legal professional privilege in relation to the information it continues to withhold.
30. As outlined above section 42(1) is a qualified exemption and therefore subject to the public interest test. The Commissioner has therefore undertaken an assessment of the public interest test.
31. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated that: "There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." It concluded that "it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..." (paragraph 35). In summary, legal professional privilege was referred to as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases. It also confirmed that when considering the public interest it is not relevant to consider the number of individuals affected by the issue. (paragraph 35) The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale. (paragraph 35)
32. In its submission to the Commissioner of 29 September 2006, DWP argued that: "Disclosure of legal advice has a significant potential to prejudice the Government's ability to defend its legal interests...(this) could result in serious consequential loss, or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decision themselves may not be taken on a fully informed basis. There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is given or make only a partial record."
33. Against the arguments for maintaining the exemption in this case, the Commissioner considered a number of public interest arguments in favour of disclosure, namely:
 - Informing debate on key issues, including allowing the public to feed into key policy decisions
 - Promoting accountability for decisions
 - Promoting probity
 - Helping people understand and challenge decisions affecting them
34. The Commissioner considers all the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. However, when relating this to the circumstances under which he considers the

section 42 exemption to hold, the Commissioner is not persuaded that the arguments for disclosure are sufficient to overcome the high threshold required for the disclosure of information to which section 42 is engaged.

35. On balance, the Commissioner concluded that in this case the public interest in disclosing this information was not sufficiently strong to outweigh the public interest in maintaining the exemption under section 42(1).

The Decision

36. The Commissioner's decision is that the public authority dealt with the request for information in accordance with section 1(1) of the Act in so far as the information the public authority continued to withhold from the complainant is exempt under section 42(1) of the Act.

Steps Required

37. The Commissioner requires no steps to be taken.

Right of Appeal

38. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 42(1)53
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 29th day of March 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 35 of the Act provides that:

(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c) between Assembly Secretaries, including the Assembly First Secretary,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.

Section 42 of the Act provides that:

(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.