

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 May 2007

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Summary

The complainant requested information held by the Ministry of Defence about legal advice obtained in relation to its duties and responsibilities, in particular to Royal Ordnance Factory pensioners, following two decisions by the European Court of Justice. The public authority confirmed that it held certain information but was withholding it under section 42 of the Freedom of Information Act 2000, claiming legal professional privilege and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner has considered the legal advice in question and is satisfied that, while it is not the information that the complainant had been expecting to be held, it is information relating closely to it and that the public authority has applied section 42 correctly to it.

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 6 September 2005 the complainant requested the Ministry of Defence (MoD) to disclose:
"what advice the department, or Government, has sought or provided regarding the application of the two judgements of the ECJ on the Royal Ordnance Factory Organisation transfer and matters, in order to ensure that the Governments' potential liabilities are properly covered."

3. On 28 September 2005 the MoD responded. It explained that legal advice had been sought in relation to earlier correspondence from the complainant on the same topic, but that it was withholding this advice under the section 42 exemption. This letter also explained that the MoD was not aware of any other advice having been taken on the specific European Court of Justice (ECJ) judgements.
4. On 7 October 2005 the complainant requested an internal review. In that letter the complainant expressed surprise that no legal advice had been sought on the issue other than in response to his enquiries.
5. On 1 December 2005 MoD confirmed that the internal review had taken place and that the original refusal had been upheld on the same ground.
6. On 11 January 2006 the complainant wrote again to MoD, clarifying his request. In this letter he explained that the issues were:
 - a) whether or not the government had sought legal advice on the extent of those responsibilities as defined by those new judgements as it became aware of them and
 - b) to have made known what view the government has been presented with, and subsequently adopted, on the matter concerned, following the seeking/obtaining of appropriately qualified advice."
7. On 7 April 2006 MoD wrote to the complainant explaining that it had not received his letter dated 11 January 2006 until a copy had been sent, along with a reminder on 23 March 2006. MoD then confirmed to the complainant that it did not seek, and therefore did not hold, legal advice in relation to the second ECJ case C-478/03, *Celtec v. Astley*.

The Investigation

Scope of the case

8. On 23 March 2006 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. An earlier letter dated 11 January 2006 to the Commissioner had not been received. The complainant specifically asked the Commissioner to look into whether Government had obtained detailed legal advice as to its duties and responsibilities, in particular to Royal Ordnance Factory (ROF) pensioners, as a result of two decisions by the ECJ. He also asked why the MoD persisted in refusing disclosure of the advice on the ramifications of the original judgement which it had sought in October 2004.

Chronology

9. On 4 April 2006 the Commissioner asked the complainant to provide further information in support of his complaint, and reminded the complainant on 11 April 2006 that he could not proceed without that information. On 25 April 2006 the Commissioner asked MoD to provide him with the requested information, which MoD did through its letter of 19 May 2006.
10. In that letter MoD explained to the Commissioner that the legal advice in question was sought in respect of a letter that the complainant had written to an MP in August 2004. MoD considered that it fell within the scope of the request because it referred to the first ECJ judgement.
11. The Commissioner reminded the complainant on 16 May 2006 that he should provide the additional information requested in earlier correspondence. In the absence of a reply it was considered that the complainant no longer wished to pursue the matter and the case was closed on 31 May 2006. The Commissioner wrote to the complainant and to MoD to that effect on that date.
12. Following fresh correspondence between the parties the case was reopened in October 2006. On 1 December 2006 the Commissioner asked the MoD for further information to clarify the complaint. The MoD replied on 8 December 2006, providing all of the additional information.
13. On 19 January 2007 the Commissioner made further enquiries of the MoD including a request to confirm whether or not it had sought specific legal advice in relation to the first ECJ judgement in the case of Henke. In its reply dated 14 March 2007 MoD confirmed that it did not take, and therefore does not hold, specific legal advice in relation to the Henke judgement. MoD declined to waive the exemption so that the nature of the information it held could be made clear to the complainant.
14. The Commissioner has considered all of the documentation and the arguments provided by both parties, including copies of the exempt information.

Findings of fact

15. The Commissioner has reviewed the information provided in this case within the following background context.
16. The Royal Ordnance Factories (ROFs) were part of MoD until 2 January 1985. On that date Royal Ordnance Plc (RO PLC) was formed. MOD employees who transferred to RO PLC became employees of that company on that date. Following the abandonment of a planned flotation in summer 1986 there was an agreed sale to Vickers PLC and of the remainder to British Aerospace PLC in April 1987.
17. The complainant has been in correspondence with various government departments since April 2004 about the implications of two ECJ judgements on the status of former employees of the ROFs.

18. The ECJ cases in question are C-298/94, Henke ECJ 1996 and C-478/03, Celtec v Astley ECJ 2005. The judgements concern the date when, in general terms, responsibility as an employer for carrying on a business moves from the transferor to the transferee. The complainant is of the view that the two judgements would have applied to the circumstances of the ROFs transfer and would have required government action.
19. In response to a Parliamentary Question on 21 July 2005, Dr Adam Ingram told Parliament that the ROFs were part of the MOD until January 1985 when their property, rights and liabilities were vested in Royal Ordnance Plc. The employees were given the option of transferring pension benefits, or preserving them in the Principal Civil Service Pension Scheme (PSCPS). The question of whether the date of transfer was 1985 or 1987 was considered by the Government to be one on which independent legal advice should be sought.
20. The complainant had written previously on 23 August 2004 to the Cabinet Office, on behalf of another party, to seek the government's view on the date of transfer of that other party's state undertaking to the private sector. This letter was passed to the MoD for reply. It is this letter on which MoD took the legal advice that is being withheld under section 42.
21. During the investigation the complainant wrote to the Commissioner on 8 December 2006 to advise him that another individual had recently asked for, and received, very similar information on request from the Civil Service Pension Complaints (CSP) Division of the Cabinet Office. The complainant provided copies of this information to the Commissioner for comparison with the information withheld by MoD.
22. The Commissioner contacted CSP Division to seek permission to consult with MoD on the matter and permission was given. On examination the material provided by CSP Division proved to contain information about the judgements, but it is not the same material that forms the subject of this case and that was requested by the complainant.

Analysis

Procedural matters

Section 1

23. The Commissioner is satisfied that MoD informed the complainant by its refusal letter dated 28 Sept 2005 that it had not sought any other legal advice on the implications of the two ECJ judgements. However the letter dated 1 December 2005, following the internal review, may have led the complainant to believe that the MoD held more information than it did. This letter concludes by saying:

“The balance of the public interest is in favour of maintaining the exemption at s42, and therefore withholding the legal advice the department has sought or provided regarding the application of the two judgements of the ECJ in respect of the transfer of the ROFs to BAe”

MoD might have taken the opportunity in that letter to confirm that it did not hold the information the complainant had specifically requested but that it did hold recorded information that, in its judgement, related to the request.

24. Through correspondence with the MoD during his investigation the Commissioner is satisfied that no other relevant information is held by it.
25. It should be emphasised again that the information held by the MoD is not precisely what the complainant sought but the information remains, nonetheless, withheld. Having noted that, the Commissioner therefore now needs to consider the public authority's use of the section 42 exemption, including its application of the public interest test. A full text of section 42 is contained in the legal annex.

Exemption

26. The section 42 exemption applied by the public authority relates to information in respect of which a claim to legal professional privilege could be maintained. Such information, subject to the operation of the public interest test, is exempt information. The legal professional privilege exemption is a class based exemption which means that it is not necessary to demonstrate that any prejudice may occur to the professional legal adviser/client relationship if information is disclosed. Instead, it is already assumed that the disclosure of information might undermine the relationship of the lawyer and client.
27. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his/her or its lawyers, and exchanges which contain or refer to legal advice which might be imparted to the client. It also includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.
28. There are two separate categories within this privilege, known as advice privilege and litigation privilege.
29. Advice privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
30. Litigation privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of providing legal advice in relation to any litigation which is already in existence or which might be in contemplation.

31. The Commissioner has considered the requested information and in his view it is clear that it relates to advice privilege. He is satisfied that it was legal advice provided to the public authority by its own lawyers and written for the sole purpose of providing advice in relation to the public authority's duties, rights and obligations. The exemption is therefore engaged.

Public interest test

32. As this exemption is also a qualified exemption, section 2 of the Act requires the Commissioner to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
33. The public interest in disclosing the requested information lies in creating accountability and transparency in actions and decisions being taken by the public authority. The complainant's arguments in favour of release are that the information requested relates to advice as to how the government should discharge its legal responsibilities to a significant group of citizens, and disclosure is required in order to establish whether or not the executive arm of government is carrying out its responsibilities properly.
34. It is the complainant's contention that release of the information will inform an accurate understanding of how the law affects legal relationships between the government, the former ROF employees and their pension fund. His concern is that if such information contradicts previous understanding of any of these relationships, then it could well affect the proper, responsible actions of any of the parties involved. In particular, knowledge that the present best advice on the relationships contradicts previously promulgated views about those relationships might create a need for the government to publicise the 'new' situation and/or take further actions. In his view proper scrutiny of the government's performance of its duties and responsibilities relies upon public knowledge about whether and how the government has sought and/or applied technical advice.
35. From its side the public authority has argued that the concept of legal professional privilege reflects the strong public interest in protecting confidentiality of communications between lawyers and clients. It is important for the government to be able to seek legal advice in relation to sensitive or difficult decisions and for such advice to be fully informed and fully reasoned. Without confidentiality clients would fear that anything they say to their lawyers, however sensitive or potentially damaging it might be, could be subsequently revealed. They might therefore be deterred from seeking legal advice at all, or from disclosing all the relevant facts to their lawyers. Equally, in the absence of an expectation of confidentiality, the advice given might not be as full and frank as it ought to be.
36. In its decision in *Bellamy v Information Commissioner* (appeal no: EA/2005/0023, FS006313) the Information Tribunal stated in paragraph 35 in respect of legal professional privilege that: "... *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 ... It may well be that ...*

where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight ... Nonetheless, 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 case”.

37. It is the Commissioner's view that, in order to facilitate the proper performance of its public functions, it is important for a public authority to be able to receive confidential and candid legal advice and engage in full and frank discussions with its legal adviser. The view expressed by the Tribunal in the Bellamy case makes it clear that only in very exceptional cases would the public interest operate to allow such advice to be released. The Commissioner is satisfied that this is not such a case, bearing in mind that the information held by MoD on this matter relates to the seeking of advice about how to reply to previous correspondence on the subject from the complainant, rather than specifically to information held on the interpretation of the ECJ judgements, which is what the complainant had requested.
38. It is the Commissioner's view that, had the MoD held information that might have affected or changed the financial position of a significant group of people, then the public interest arguments in favour of release would have been much stronger. Whether or not MoD should have sought specific legal advice in relation to both of the ECJ judgements at the time they were delivered, or subsequently, is a quite separate issue over which the Commissioner has no jurisdiction.
39. The Commissioner is therefore satisfied that, in the particular circumstances of this case, the public interest in withholding the legal advice outweighs the public interest in disclosure.

The Decision

40. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that section 42 was correctly applied.

Steps Required

41. The Commissioner requires no steps to be taken.

Right of Appeal

42. 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 4253
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 23rd day of May 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
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SK9 5AF**