

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 23 July 2007

**Public Authority:** Hearing Aid Council  
**Address:** 70 St Mary Axe  
London  
EC3A 8BD

### Summary

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The complainant asked for legal advice obtained by the public authority about specific issues. The public authority declined to disclose the information relying upon the section 42 exemption and claiming that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. Subsequently the public authority claimed that it did not want to confirm or deny whether it held the requested information.

### The Commissioner's Role

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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

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2. On 23 June 2006 the complainant made the following request: *'I request the following under the auspices of the Freedom of Information Act 2000: 1. The legal advice given to the Hearing Aid Council (HAC) appertaining to the scope and nature of the immunity from civil action (if any) that is attached to complainants to the HAC in their making and exercising of a complaint to the HAC. 2. The legal advice given to the HAC appertaining to Article Six (The Right to a Fair Trial) that is enshrined within the within the Human Rights Act 1998, and the Competition Act 1998 respectively, and their incompatibilities with a situation whereby a HAC Disciplinary Committee that includes a representative of a commercial organisation "A", exercises its statutory powers to pass judgment upon a representative of a commercial organisation "B", where "A" is a competitor to "B" in the marketplace.*

3. On 25 August 2006 the public authority responded and declined to disclose the information relying upon the section 42 exemption, but offered to meet the complainant to discuss his concerns about the disciplinary and complaints systems administered by the HAC. The public authority also explained that, as it did not have a complaints procedure, the complainant could complain directly to the Commissioner if he was unhappy with its response.

## The Investigation

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### Scope of the case

4. On 26 August 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - the requested information does not attract legal professional privilege as the advice would be directed at and centred on complainants to the HAC.
  - it is self evident that there would be an overwhelming public interest in the scope of any civil immunity that members of the public have in the making and exercising of a complaint to the HAC.
  - witnesses of fact in court have immunity from civil action therefore if complainants to the HAC do not, it is an urgent matter of public interest.
  - if the HAC has been advised that some or all of its future disciplinary processes would be unlawful then the advice cannot attract legal professional privilege as it relates to proposed future unlawful activity.
  - if the HAC has been advised that its disciplinary processes are lawful there cannot be any detriment to the HAC for the advice to be disclosed as it would reassure the public in accordance with the public interest.
  - it is contrary to the public interest for just the hearing aid companies represented on the HAC's disciplinary committee to be informed of the HAC's legal advice.
  - the complainant invited the Commissioner to consider issuing guidelines in respect of the entire legal advice given to the HAC, not just the requested legal advice relating to his complaint.
5. As the public authority subsequently informed the Commissioner that it did not want to confirm or deny whether it held the requested information, the Commissioner has looked at whether section 42(2) duty to confirm or deny, has been applied correctly in this particular case.
6. Subsequently, the public authority informed the Commissioner that it was prepared to inform the complainant that it was not aware of any legal advice being obtained on either of the matters referred to in his request for information.

## Chronology

7. On 2 March 2007 the Commissioner asked the public authority to clarify which branch of legal professional privilege it was relying upon. The public authority responded explaining that the requested information was exempt under the legal advice branch of legal professional privilege. However the public authority went on to state that on checking its data it could not actually identify the requested information. It further stated that it was not clear what period of time the complainant's requests referred to.
8. On 9 May 2007 the Commissioner asked the public authority to clarify whether it held the request information. The public authority confirmed that it did not hold the requested information and that it did not want to either confirm or deny this. The Commissioner asked the public authority to clarify why it did not want to confirm or deny whether it held the requested information.
9. On 17 May 2007 the public authority wrote to the Commissioner explaining that as it was a regulator it had to ensure that its processes and procedures satisfied the requirements of natural justice at all times. This meant its processes were continually legally scrutinised to ensure fairness and therefore the principles of natural justice are satisfied.
10. On 5 June 2007 the Commissioner contacted the public authority and asked it to further clarify why it did not want to confirm or deny whether it held the requested information. The public authority did not respond.
11. On 13 June 2007 the Commissioner contacted the public authority again and asked it to further clarify why it did not want to confirm or deny whether it held the requested information.
12. On 15 June 2007 the public authority contacted the Commissioner stating that it was not in the public interest for it to confirm or deny that it held the requested information as it was not in the public interest for a regulator to have to disclose whether it had obtained legal advice or not. However, it also stated that it was prepared to disclose to the complainant the fact that it was not aware that any legal advice had been obtained on either matters in his request of 23 June 2006.
13. On 20 June 2007 the Commissioner responded to the public authority and asked to be informed when it had disclosed the information to the complainant. The public authority responded on the 2 July 2007 stating that it was sending a letter to the complaint explaining that it did not hold the requested information.
14. On 23 July 2007 the public authority confirmed that it had contacted the complainant on the 3<sup>rd</sup> and 13<sup>th</sup> July to confirm that it did not hold the requested information.

## Analysis

15. The Commissioner will deal with this case by considering firstly, any procedural

breaches and secondly, the public authority's use of the section 42 exemption, including its application of the public interest test. A full text of the relevant statute referred to is contained in the legal annex.

### **Procedural matters**

16. Section 17(1) of the Act provides that where a request for information is refused upon a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or on a claim that information is exempt information, the public authority must within 20 working days of receipt of the request, issue a refusal notice explaining what exemption(s) have been relied upon. Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon. While the public authority stated which exemption it was relying upon, it did not explain that it was relying upon the duty to confirm or deny whether it held the requested information (section 42(2)).
17. Section 17(3)(a) of the Act provides that where a public authority is considering the public interest it must state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing the information. The public authority did not provide any public interest arguments in support of its decision to apply section 42.
18. The public authority was required by virtue of section 17(7)(b) to provide particulars of the complainant's right to appeal under section 50 of the Act. Although the public authority explained that it did not have a complaints procedure and the complainant could complain directly the Information Commissioner's Office, it did not provide the Commissioner's contact details.
19. Accordingly the Commissioner finds that the public authority has failed to fully discharge the obligation imposed upon it by section 17 of the Act.

### **Section 42 exemption**

20. The section 42 exemption provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
21. After the public authority explained that it did not actually hold the requested legal advice and did not want to confirm or deny whether it did, the Commissioner firstly considered whether, if the public authority had held the requested information the section 42 exemption would apply. He then went on to consider the duty to confirm or deny, as discussed in the ICO Awareness Guidance No 21 Duty to Confirm or Deny.
22. As the request was for legal advice the Commissioner is satisfied that had the public authority obtained the requested legal advice the section 42 exemption would have applied to that advice. However no advice was obtained.

23. He then considered section 42(2) which provides: “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”. In other words whether confirmation or denial by the public authority as to whether it held the requested legal advice constituted a breach of legal professional privilege.
24. 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.
25. There are two separate categories within this privilege known as legal advice privilege and litigation privilege.
26. Legal 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.
27. Litigation privilege arises where litigation is contemplated or is in fact underway. Where this is the case privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of proposed or on-going litigation. This includes communications between a professional legal adviser and her/his client, communications with third parties made for the purpose of assisting the client’s case for example expert opinion and may cover a variety of documents.
28. The public authority argued that if it confirmed or denied whether it held the requested information it could be challenged in court if it had failed to obtain legal advice relating to its procedures. It further argued that this could lead to loss of resources if it had to defend any challenges and that there could also be a loss of regulatory certainty whilst any challenges were being deal with.
29. The public authority further argued that disclosure of legal advice obtained about its procedures and processes could lead to it either not making full and permanent records or only making partial records of legal advice in the future. This in turn could lead to the public authority making flawed decisions as its records would not describe the process of decision making fully.
30. The Commissioner has considered the arguments put forward by the public authority in relation to wishing not to confirm or deny whether it held the requested information.
31. The Commissioner considers that the public authority has not been able to demonstrate that either confirming or denying whether it held the requested information would constitute a breach of legal professional privilege.

## The Decision

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32. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with sections 1 (as discussed below) and 17 of the Act (as discussed in paragraphs 15 – 18).
33. It is the Commissioner's view that the public authority applied section 42(2) incorrectly in that it would not constitute a breach of legal professional privilege if it had either confirmed or denied that it held the requested information. Therefore the public authority should have informed the complainant that it did not hold the requested information under section 1 of the Act which provides that any person making a request for information is entitled to be informed in writing by the public authority whether it holds the requested information and if it does, to have information communicated to him.

## Right of Appeal

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34. 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](mailto: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 23<sup>rd</sup> day of July 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### Section 1(1) provides 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.

### Section 17(1) provides that -

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

### Section 17(3) provides that -

A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information

### Section 17(7) provides that-

A notice under subsection (1), (3) or (5) must-

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.



**Section 42(1)** provides that –

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.”

**Section 42(2)** provides that –

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.