

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date

Public Authority: Law Commission
Address: Conquest House
37 – 38 John Street
Theobalds Rd
London
WC1N 2BQ

Summary

The complainant requested information relating to exchanges between the public authority and Parliamentary Counsel in connection with specific work undertaken by the public authority. The public authority refused to disclose the requested information, citing sections 36 and 42. The Commissioner finds that section 42 was applied correctly. As this decision relates to all the withheld information, the Commissioner has not reached a conclusion as to whether section 36 was applied correctly. The Commissioner also finds that the public authority failed to comply with the Act in that it did not issue the refusal notice within 20 working days of receipt. This breach does not necessitate remedial action.

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 26 June 2005, the complainant made the following information request:

"I would be grateful to receive such documents in the following categories as the Commission believes to be liable to disclosure under the FOI Act, or believes to be exempt but is nevertheless prepared to disclose, in respect of Law Com No. 276 (Fraud) and No. 277 (The Effective Prosecution of Multiple Offending):

Instructions to Parliamentary Counsel, and subsequent correspondence between

Counsel and Commission staff (including draft clauses)”

3. The public authority responded to the complainant initially on 25 July 2005. Whilst this response addressed a number of other information requests made by the complainant on 26 June 2005, the request to which this notice relates was not addressed in the response of 25 July 2005.
4. The public authority responded to the request above on 4 August 2005, outside the time limit of 20 working days. In this response the public authority stated that the information requested would not be provided as it was considered subject to legal professional privilege and, therefore, exempt under section 42. The public authority also considered this information exempt under section 36(2)(b)(i) as it was considered that disclosure of this information would be likely to inhibit the free and frank provision of advice between the public authority and Parliamentary Counsel. This refusal notice contained no mention of the public interest.
5. The complainant responded to the public authority on 29 August 2005. In this correspondence, the complainant set out his arguments as to why he did not agree with the exemptions cited by the public authority when refusing his request.
6. The complainant stated that he did not agree that instructions from the public authority to the Parliamentary Counsel's Office (the "PCO") would be subject to legal professional privilege as these instructions are not normally a request for advice, legal or otherwise. The complainant believed that these instructions are explanations of policy that has already been decided upon and that any advice that is requested is not the main purpose of these instructions. The complainant was particularly certain of this position in relation to the instructions to Counsel falling within the scope of his information request, as he had drafted these instructions during his time as an employee of the public authority.
7. The complainant further argued that correspondence between the public authority and Parliamentary Counsel does not primarily consist of advice, or requests for advice. The complainant described these correspondence as containing clarification, rationalisation or refinement of policy.
8. The complainant stated that he considered the above arguments also applied against the citing of section 36. The complainant also asked the public authority to confirm who the qualified person was for the purposes of section 36.
9. The public authority responded with the outcome to its internal review on 2 November 2005. This response firstly confirmed that the qualified person for the purposes of section 36 was the Chief Executive of the public authority.
10. The public authority went on to give the conclusions of the internal review, which upheld the initial refusal under sections 36 and 42. Firstly the public authority confirmed that the information withheld was considered legal advice and subject to legal professional privilege. In arguing that the exchanges between the public authority and the PCO did constitute legal advice, the public authority referred specifically to the *Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48* case and to guidance

produced by the Information Commissioner that the seeking of advice cannot be separated from the advice itself.

11. The public authority also upheld the refusal under section 36(2)(b)(i). The public authority reiterated from the refusal notice that it considered disclosure here could prejudice free and frank advice between the public authority and the PCO. The internal review also stated that it believed that the public interest favoured the maintenance of the exemptions cited.
12. The complainant contacted the public authority on 6 November 2005, again stating that he did not agree with the interpretation of the public authority that exchanges between it and the PCO would constitute legal advice and complaining that he did not believe that the public authority had adequately argued its position. The public authority responded to the complainant on 11 November 2005, reiterating that it did not agree with the complainant's arguments.

The Investigation

Scope of the case

13. The complainant contacted the Commissioner by correspondence dated 26 December 2005. In this letter, the complainant raised the issue of the refusal by the public authority to disclose the requested information. The complainant commented specifically that he did not agree that the information withheld constituted legal advice and that he did not believe that the public authority had explained its position fully.
14. The information request made by the complainant concerns the Fraud Bill. The intention of this Bill was to simplify the law in the area of fraud and seek to bring under control the length and complexity of fraud trials. The Fraud Act received Royal Assent on 8 November 2006.

Chronology

15. The Commissioner contacted the public authority on 21 May 2007. In this letter the public authority was informed of the issues raised in the complaint and was asked to respond with clarification of its stance.
16. In connection with section 36, the public authority was asked to confirm which of sections 36(5)(a) to (o) applied. If the answer to this was (o), the public authority was asked to confirm whether the public authority itself, or an officer or employee of the public authority, had been designated by a Minister of the Crown as the qualified person.
17. Further to this, the public authority was asked to describe why the qualified person considered that disclosure in this instance would inhibit the free and frank provision of advice. The public authority was also asked to confirm why it

considered that the public interest favoured the maintenance of this exemption.

18. In connection with section 42, the public authority was asked to confirm whether advice privilege or litigation privilege was claimed. The public authority was asked to state why it considered that the information withheld here constituted legal advice. The contention of the complainant that exchanges between the public authority and the PCO did not constitute legal advice was raised and the public authority was asked to comment in response to this. The public authority was also asked to confirm why it considered that the public interest favoured the maintenance of this exemption.
19. The public authority responded by letter dated 26 June 2007. The public authority firstly clarified its role, which is to issue recommendations aimed at ensuring the law is as fair, modern, simple and cost effective as possible.
20. The public authority also described its relationship with the PCO as follows:

“The role of PCO and our dealings with them is unique across government in that we have a small team of their legislative draftsmen/women out-stationed in our offices, receiving written and oral instructions from our staff and discussing with them the practicalities of putting the Commission’s policy recommendations into a draft Bill, taking account of the impact it would have on other legislation and a host of other related legal matters. The relationship and close partnership we enjoy with them is essential to the successful work of the Commission. The nature of that relationship is one of legal adviser (the PCO) and client (the Law Commission).”
21. The public authority went on to give its arguments in relation to the exemptions cited. Firstly, in relation to section 36, the public authority confirmed that section 36(5)(o) applied and that the Chief Executive had been appointed as the qualified person for the purposes of this exemption.
22. The public authority went on to describe why, in the reasonable opinion of the qualified person, disclosure of the information requested here would prejudice the free and frank provision of advice between the public authority and the PCO. The opinion of the qualified person was that disclosure here would affect the willingness of the PCO to give frank advice. The public authority also stated that the PCO had confirmed that it considered it important that its staff not be inhibited from giving frank advice.
23. The public authority went on to give its arguments regarding the public interest in connection with this exemption. The public authority argued that its relationship with the PCO was of critical importance to its work and that any prejudice caused to this relationship would harm the work of the public authority. The public authority stated that any actions likely to hinder its role of reviewing the law on the behalf of the public would not be in the public interest.
24. The public authority went on to clarify why it believed that the information requested was exempt under section 42. The public authority firstly clarified that the exemption claimed was advice privilege rather than litigation privilege.

25. The public authority referred to a reference to the PCO at paragraph 41 of the *Three Rivers* judgement. The public authority stated that this made it clear that legal professional privilege covers advice and correspondence to the PCO relating to the drafting and preparation of bills.
26. The public authority went on to state that its entire dealings with the PCO relate to the drafting of legislation and related legal matters and that it considered that all of its dealings with the PCO constituted a request for legal advice. The public authority referred to particular documents withheld from the complainant, which the public authority had provided to the Commissioner previously, and which the public authority stated illustrated its point that this withheld information did constitute legal advice.
27. The public authority emphasised that, where the Government accepts the recommendations of the public authority and introduces a Bill as a result, exchanges between the public authority and the PCO and the Government department sponsoring the Bill and the PCO would be part of the same process. The argument of the public authority here was that these should not be seen as separate processes, one of which may be subject to legal professional privilege and the other not.
28. The public authority went on to give details of its public interest considerations in connection with this exemption. The public authority recognised a public interest in disclosing the information requested where this would show that decisions taken during the preparation of a Bill had been made for sound reasons and on the basis of good quality legal advice.
29. However, the public authority also believed that there was a strong public interest in a person being able to seek legal advice without fear that exchanges with their legal adviser would later be subject to disclosure. The public authority referred to the overall strong public interest in maintaining the confidentiality of legal advice between legal adviser and client and stated that it was particularly important that the public authority is able to have fully candid exchanges with the PCO when drafting legislation. The public authority argued that this would be in the public interest as it contributes to good legislation.
30. The public authority stated that it had also sought the views of the Home Office as the lead policy department relating to the information falling within the scope of the complainant's request. The view of the Home Office was that the public interest here is in favour of maintaining the section 42 exemption.
31. The Commissioner contacted the public authority by telephone on 11 July 2007. During this conversation, the public authority was asked to confirm, firstly, whether the exemptions provided by both sections 36(2)(b)(i) and 42 were considered to apply to all the information withheld from the complainant. The public authority confirmed that both of these exemptions were considered to apply to all of the withheld information.
32. Secondly, it was noted that the withheld information consisted of communications

between the public authority and the PCO and draft Bills produced by the public authority. The public authority was asked to confirm whether it was standard practice for draft Bills produced by it to remain confidential and whether it was aware of any circumstances, other than requests made under the Act, in which draft Bills would be publicly available or disclosed to any person. The public authority confirmed that it was standard practice for draft Bills to remain confidential and that the only circumstances in which these would be released would be after the statutory retention period of 30 years.

33. The Commissioner contacted the public authority again on 17 October 2007 and noted that a draft version of the Fraud Bill was available on the website of the public authority. The public authority was asked to respond with clarification of the circumstances and timing of a draft Bill prepared by it being made publicly available.
34. The public authority responded to this on 12 November 2007. The public authority confirmed that the draft versions of the bill withheld from the complainant were earlier 'work in progress' versions of this bill. The version of the draft bill that is publicly available is a final draft. The public authority maintained that the earlier 'work in progress' drafts are subject to legal professional privilege, despite the final versions being available online. The public authority also confirmed that the normal process would be to make final drafts of bills publicly available, but earlier versions would not be made publicly available.

Findings of fact

35. The Chief Executive of the public authority is listed as the qualified person for the purposes of section 36 by the Ministry of Justice. This listing can be viewed at: <http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm#l>
36. The website of the PCO states the following about its relationship with the public authority: *"Members of the PCO are also loaned (usually for two years at a time) to the Law Commission where they are mainly engaged on the preparation of law reform Bills and consolidation Bills."*

Analysis

Procedural matters

Section 17

37. The information request was made on 26 June 2005. The public authority responded to this on 4 August 2005. In failing to issue the refusal notice within twenty working days of the request the public authority failed to comply with the requirement of section 17(1) that an information request should be responded to within 20 working days of receipt.

Exemption

Section 42

38. When considering whether information has been withheld correctly under this provision, it is necessary for the Commissioner to consider two issues:

- Is the information in question subject to a claim of legal professional privilege and, therefore, the exemption engaged? And
- Where the exemption is engaged, does the public interest favour the maintenance of the exemption?

Is the exemption engaged?

39. As referred to above, the withheld information consists of draft bills and communications between the public authority and the PCO. Consideration was given as to whether these differing types of recorded information should be considered separately when considering whether the exemption is engaged.

40. Having reviewed the withheld information, it is clear to the Commissioner that the communications and draft bills are part of the same process; the communications all focus on the draft bills and the drafts are amended in response to the contents of the communications. The approach of the Commissioner has been to consider all of the withheld information, both communications and draft bills, as a whole and his conclusion as to whether the exemption is engaged relates to the withheld information in its entirety.

41. The complainant himself has previously been party to at least some of the withheld information as a former employee of the public authority. For the purposes of considering whether this information is subject to legal professional privilege this is not relevant. The Commissioner would also stress that disclosure under the Act is an indication that the information in question should be disclosed to any applicant, not only the individual applicant in a particular case.

42. The public authority describes its relationship with the PCO as that of legal adviser (PCO) and client. The public authority states that the role of the PCO in relation to the work of the public authority is to advise on the practicalities of converting the policy proposals of the public authority into a draft bill. The public authority has also referred to a specific reference at paragraph 41 of the House of Lords *Three Rivers* judgement. This states that in the context of advice provided by Parliamentary Counsel to the Government “*the relevant legal context is unmistakable and that legal advice privilege should apply.*” The public authority has further argued that all of the exchanges between it and the PCO are centred on the seeking and provision of legal advice and thus would be subject to advice privilege.

43. The complainant has argued that correspondence between the public authority and PCO is not primarily concerned with legal advice. He describes the exchanges as clarification, rationalisation or refinement of policy. As a former employee of the public authority, the Commissioner recognises that the complainant has a clear knowledge of the purposes of the exchanges between

- the public authority and the PCO. However, the Commissioner also considers it possible that clarification, rationalisation or refinement of policy could be considered legal advice, where the advice focuses on the legal effect of those amendments.
44. The Commissioner notes the overall context of the relationship between the public authority and the PCO. This is based on the necessity of the public authority receiving advice on its recommendations about legislation. Further to this, it is necessary to consider whether this relationship could be accurately characterised as that between legal adviser and client.
 45. The information withheld includes communications exchanged between the public authority and the PCO in both directions. As referred to by the public authority when refusing the request, the Commissioner's guidance on this exemption states that the seeking of legal advice cannot be separated from the advice itself. The Commissioner's conclusion here therefore relates to exchanges in both directions between the public authority and the PCO.
 46. The Commissioner notes the description provided by the public authority of "legislative draftsmen/women" from the PCO being outsourced within the public authority. These outsourced staff members from the PCO provide advice about the recommendations for legislation. As this advice relates to legislation, it appears reasonable to characterise this as legal advice. On the issue of whether the advice has been provided by qualified legal advisers, on its website, the PCO refers to itself as a team of lawyers, some of which are 'loaned' to the public authority. The Commissioner is satisfied, therefore, that the PCO staff outsourced to the public authority are qualified legal advisers and that the relationship between the public authority and the PCO is that of legal adviser (PCO) and client.
 47. Turning to the nature of the specific information withheld from the complainant in this case, this relates to a draft bill produced by the public authority. The exchanges show the public authority has sought advice from the PCO on the draft bill. The withheld information also shows the responses from the PCO. The withheld information includes various versions of the draft bill, amended to take into account the advice given by the PCO.
 48. Having concluded above that the relationship between the public authority and the PCO can be accurately characterised as that between legal adviser and client, and the exchanges in this case relate to legislation, the Commissioner is satisfied that the withheld information constitutes legal advice.
 49. In coming to this decision, the Commissioner also notes the specific reference in the House of Lords *Three Rivers* judgement that advice provided by Parliamentary Counsel to the Government would constitute legal advice. Although the advice here has been provided to the public authority rather than to the Government, the Commissioner is satisfied that this reference in the *Three Rivers* judgement is relevant.
 50. Given that there is considerable information in the public domain about the

changes made to the law in this area, the Commissioner has considered whether an argument could be made that legal privilege in relation to the information withheld has been waived, including whether it could be said to have been waived in relation to any part of the information. It is notable that the Home Office website includes the following comment about the Fraud Bill:

“The risk of changing the law is that of unforeseen consequences. In the light of reactions to the Consultation Paper, we have reduced that risk to a minimal level by retaining the wide common law offence of 'conspiracy to defraud' (contrary to the Law Commission's original recommendation). This provides a 'safety net' for any cases conceivably not caught by other charges.”

51. Consideration was given to whether this disclosure indicated that legal professional privilege had, in effect, been waived in relation to any advice about the ‘conspiracy to defraud’ offence. The Commissioner concludes that privilege has not been waived here. The key issue is that the Home Office was not the client receiving the legal advice here; privilege can only be waived, intentionally or otherwise, by the client. Also of note is that nothing identifiable as legal advice has been disclosed here. Whilst it has been disclosed that the public authority recommended the abolition of the conspiracy to defraud offence, there is no indication as to whether this recommendation had been made on the basis of legal advice.
52. As stated above at paragraph 33, the final draft version of the Fraud Bill is publicly available. Whilst the public authority does not consider itself to have waived privilege in respect to these early drafts, it is necessary to consider whether privilege has, in effect, been waived due to the availability of the final draft.
53. On this issue, the Commissioner accepts that the public availability of this Bill does not indicate that legal professional privilege in connection with earlier drafts has been waived. The Commissioner notes that the earlier drafts included within the withheld information differ from the final draft and accepts that the alterations made between the earlier versions and the final draft version are, at least in part, the result of legal advice.
54. The Commissioner is satisfied that the information in question is legal advice and that it would be subject to a claim of legal professional privilege. The exemption is, therefore, engaged.

The public interest

55. Section 42 provides a qualified exemption for information covered by legal professional privilege. This means that information subject to this exemption should be disclosed if the public interest favours this over the maintenance of the exemption. The considerations of the Commissioner about the balance of the public interest in this case are explained below.
56. The Commissioner considered that there is a strong element of public interest built into legal professional privilege, which must be taken account of when

considering the application of section 42. In the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal observed that “there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned.” (paragraph 8).

57. In summing up, the Information Tribunal stated 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 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).
58. The public interest in disclosing the information must therefore, at the least, match the public interest in maintaining the exemption before privilege will be overturned, and it is recognised by the Information Tribunal that the public interest in protecting the doctrine of legal professional privilege is strong.
59. The complainant’s arguments in this case focus on his belief that the withheld information does not constitute legal advice and thus the exemption would not be engaged, rather than arguments about why the public interest in disclosure should override the exemption.
60. However, the Commissioner has identified a number of public interest factors in favour of release of the requested information which he considers to be relevant in this case.
61. Firstly, he recognises that releasing the requested material would improve the understanding and openness of the law making process. The manner in which the Government formulates law is an issue of the most widespread significance and therefore this argument carries considerable weight. In this case the Commissioner notes that the request was not made directly to the central government department with responsibility for formulating the policy that has led to the Fraud Bill. Nevertheless the public authority does play an important role in this process and there is a public interest in understanding more about its work on this particular bill.
62. The public authority recognises that disclosure of information showing that decisions made during the preparation of a Bill had been made for sound reasons and were based on good quality legal advice would be in the public interest.
63. Much notice has been paid to fraud related court cases which have collapsed due to the jurors being unable to comprehend the evidence as a result of its extreme complexity. As noted at paragraph 14, the intention of the Fraud Bill was to reduce the complexity of the law in this area. The fact that court cases have collapsed, sometimes after having proceeded for months or years, due to the unmanageably complex law in this area, clearly runs counter to the public interest, both in terms of the difficulty of securing the conviction of those that have committed fraud and in the significant sums of public money spent on collapsed trials.

64. The Commissioner considers that the information withheld in this case would increase accountability and transparency on the part of the public authority. It would help the public to understand how different drafting decisions have been reached and to determine what drafting options were accepted and/or rejected and why. Given that one of the aims of the Fraud Bill was to simplify the law in this area, in light of the problems outlined above, the Commissioner has given this argument considerable weight when considering where the public interest balance lies.
65. Where the Commissioner is asked to make a decision under section 50 of the Act he is required to consider whether or not the public authority complied with the request for information at the time it was made. This was confirmed by the Information Tribunal in the case of *The Secretary of State for Work and Pensions vs The Information Commissioner (EA/2006/0040)*. In that case the Tribunal explained that “as we have said in other cases (e.g. *DTI v Information Commissioner* at paragraphs 44 and 46) the competing public interests should be assessed by reference to the time when the request was made and not by reference to the time when the Commissioner made his decision or the time when the Tribunal hears this appeal”.
66. Therefore, the Commissioner must consider the public interest arguments as they applied at the time of the complainant’s request. The public consultation on the Fraud Bill concluded on 9 August 2004. However, the Bill remained the subject of parliamentary debate at the time the request was made and did not achieve Royal Assent until 8 November 2006. In the Commissioner’s view, the fact that the Bill was still passing through parliament at the time of the request adds weight to the argument that disclosing the requested information would have informed that debate. In addition, it is likely to have assisted the public to challenge the proposals and influence the decisions being made from a more knowledgeable standpoint.
67. However, the inherent public interest in the maintenance of legal professional privilege is strong. The Commissioner recognises that the fact that the exemption provided by section 42 is subject to the public interest demonstrates an intention of the part of the authors of the Act that there would be circumstances in which disclosure will be of greater public interest than the maintenance of legal professional privilege and the Commissioner has previously issued decisions to this effect.
68. In order for the Commissioner to conclude that legal professional privilege should be overridden, it must be clear that there is a strong public interest favouring this. Whilst the Commissioner recognises that there are significant public interest arguments in favour of disclosure in this case, the conclusion here is that these are not sufficiently compelling to outweigh the inherent public interest in the maintenance of legal professional privilege. In reaching this conclusion the Commissioner has placed significant weight on the fact that, having seen the material in question, he is satisfied that the level of harm to the principle of legal professional privilege would be considerable if it were released. In addition he has been mindful of the fact that the information in question related to a live issue and

therefore there is no argument that the advice was stale or that the harm would be more limited because of the age of the information. Finally, he recognises that the public authority is likely to require similar advice in the future. It is important that the public authority is able to obtain full and frank legal advice to ensure the quality and standard of other draft bills particularly given the potential practical effect on peoples' legal rights, duties and liabilities.

Section 36

69. As the Commissioner has concluded that the withheld information is, in its entirety, exempt under section 42 and that the public interest favours the maintenance of this exemption, the withheld information will not be disclosed regardless of the outcome of any considerations concerning whether the exemption provided by section 36(2)(b)(i) has been applied correctly here. For this reason, the Commissioner has not considered and has reached no conclusion in regard to the application of section 36(2)(b)(i).

The Decision

70. 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 applied correctly.
71. However, the Commissioner also finds that the public authority failed to comply with the Act in that it did not issue the refusal notice within 20 working days of receipt.

Steps Required

72. Although the Commissioner has found that the public authority failed to comply with section 10 of the Act, this breach does not necessitate remedial action. The Commissioner does not, therefore, require the public authority to take any steps.

Right of Appeal

73. 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@tribunals.gsi.gov.uk

74. 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 xx day of xx 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House**

Reference: FS50100137



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