

Freedom of Information Act 2000

Decision Notice

Date: 8 June 2010

Public Authority: Department for Social Development (Northern Ireland)
Address: Lighthouse Building
Cromac Place, Gasworks Business Park
Belfast BT7 2JB

Summary

The complainant requested information relating to DSD's Strategic Business Review team. DSD provided the complainant with most of the requested information, however it refused to disclose legal advice in reliance upon the exemptions as set out in section 35(1)(a) and section 42(1) of the Act. The Commissioner finds that the section 42(1) exemption is engaged in relation to the entirety of the withheld information within the scope of the requests. He also finds that the public interest in maintaining the section 42(1) exemption outweighs that in disclosure of the withheld information. He has therefore not considered section 35(1)(a). The Commissioner also found that DSD breached sections 17(1)(b), 17(1)(c) and 17(3)(b) of the Act.

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.

Background

2. The Social Security Agency (SSA) is an executive agency of the Department for Social Development (NI) (DSD). The Strategic Business Review Project (SBR) was formally established in January 2006. The purpose of the SBR was to review SSA's operational and

business structures to ensure that it could continue to offer a high standard of service to customers in the future given known policy and operational changes and the need to maintain parity with the UK's Department for Work and Pensions (DWP).

The Request

3. The Commissioner has received a complaint which states that, on 25 November 2008 the complainant made the following requests for information to the DSD(NI):

"I would like to request a breakdown of the SBR review team as follows – how many members prior to working on the team were from:

1. Human Resources sections
2. Local Office sections
3. Central Support sections
4. Trade Union officials

Also would it be possible to obtain a copy of any legal advice given to the team?".

4. On 18 December 2008, DSD responded to the complainant. DSD provided the information requested at points 1-4. However DSD refused to provide the legal advice requested, citing section 35(1)(a) (which relates to information about the formulation and development of government policy) as a basis for refusing to disclose that advice (the withheld information).
5. On 18 December 2008, the complainant requested an internal review of DSD's decision not to disclose the withheld information. The complainant was of the view that DSD had failed to explain why it was withholding information. In addition the complainant pointed out that the exemption at section 35(1)(a) is qualified, and DSD had not provided any details of its public interest considerations.
6. DSD wrote to the complainant on 19 January 2009 to advise that it required additional time to consider the public interest as part of the internal review. DSD wrote to the complainant on 28 January 2009 with the outcome of the internal review, which was to uphold the original decision not to disclose the withheld information. DSD advised that it now considered the withheld information to be exempt under section 35(1)(c) as well as section 35(1)(a).

The Investigation

Scope of the case

7. Unfortunately, due to a backlog of complaints at the Commissioner's office about compliance with the Act, there was a significant and regrettable delay before his investigation into this complaint got underway. On 29 January 2009 the complainant contacted the Commissioner to complain about the way his request for legal advice had been handled. The complainant specifically asked the Commissioner to consider the following points:
- DSD's application of the exemptions in sections 35(1)(a) and (c) of the Act.
 - DSD's failure to provide the complainant with a detailed explanation as to why it was refusing to disclose the withheld information.

Chronology

8. On 12 January 2010 the Commissioner wrote to DSD requesting a copy of the withheld information and further explanatory details regarding its refusal to provide the complainant with the withheld information.
9. On 9 February 2010 DSD replied to the Commissioner, providing a copy of the withheld information and its detailed explanation as to its application of the exemptions as set out in sections 35(1)(a) and (c) of the Act. In that reply, DSD stated that it had incorrectly applied section 35(1)(c) to the withheld information and now wished to rely on section 42(1) of the Act (legal professional privilege) together with section 35(1)(a) as a basis for withholding that information. It provided the Commissioner with detailed arguments in support of its application of both exemptions to the withheld information.

Analysis

Exemptions

Late reliance on exemptions

10. The Commissioner notes that DSD(NI) sought to rely on the exemption at section 42(1) during the course of the investigation. The Commissioner has discretion as to whether or not he will consider

exemptions applied by the public authority during his investigation. The Commissioner is assisted in making a decision on this point by the First-Tier Tribunal (Information Rights) decision in the case of *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072)*. The Tribunal questioned whether a new exemption can be claimed for the first time before the Commissioner, concluding that the Tribunal (and by extension the Commissioner), "*may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case*".

11. In deciding whether or not to consider late application of the section 42(1) exemption, the Commissioner has had regard to DSD's reasons for introducing this exemption. DSD originally claimed reliance on section 35(1)(c), which applies to legal advice obtained from the Law Officers. However, DSD subsequently clarified that it had incorrectly cited section 35(1)(c) and that it should have relied upon section 42(1).
12. The Commissioner notes that DSD's arguments in relation to section 35(1)(c) related to the fact that the withheld information was legal advice. The Commissioner is of the view that the exemption at section 42(1) is appropriate to the nature of the information in question, and the Commissioner is mindful of potential impact of disclosure of information which ought to be protected by legal professional privilege. Therefore in this case the Commissioner considers it appropriate to consider DSD's arguments in relation to the exemption at section 42(1). However the Commissioner remains of the view that any exemptions relied on by a public authority must be supported with reasoned and robust arguments.

Section 42(1) – legal professional privilege

13. The full text of section 42(1) is available in the Legal Annex at the end of this Notice. Legal professional privilege (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)* 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 [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."
(para. 9)

14. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
15. Advice privilege will apply where no litigation is in progress or being contemplated. 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 principal or dominant purpose of obtaining legal advice.
16. The category of privilege upon which DSD is relying as a basis for non-disclosure of the withheld information is advice privilege. DSD argued that the withheld information attracts advice privilege as it consists of legal advice provided to the SBR and requests for, and follow-up questions regarding, such advice by SBR team members.
17. The Commissioner is satisfied that the majority of the withheld information constitutes confidential communications between a client and a legal adviser made for the dominant purpose of seeking or providing legal advice and that section 42(1) applies. The material consists of requests for legal advice to a lawyer at the Departmental Solicitor's Office (DSO) by clients within the DSD and the lawyer's responses. However, some of the withheld information is not of this nature. Instead it constitutes communications which don't appear to have been made for the dominant purpose of seeking or providing legal advice. Furthermore it does not appear that any of the parties to the communications are legal advisers. The information falling into this category nevertheless contains the details of legal advice that was originally sought by individuals within DSD from their legal adviser. In other words the information amounts to onward communications of the legal advice.
18. The Commissioner recognises that public authorities act through their officers. Therefore whilst one officer may obtain legal advice it may be that an individual in another department needs to act upon it and therefore the content needs to be shared. The Commissioner therefore accepts that in some cases where one individual receives advice but it is then shared with another privilege may still apply. In such circumstances privilege will only apply to a direct summary, or extract from, the original legal advice and it must be clear that the information being shared is legal advice subject to legal professional privilege.

Having reviewed the withheld information the Commissioner is satisfied that the material which does not constitute a communication directly between a client and their legal adviser nevertheless satisfies these criteria and therefore the exemption in section 42(1) was engaged.

19. When reviewing the withheld material that DSD supplied to assist his investigation, the Commissioner identified several pieces of information that fell outside the scope of the request. This was on the basis that either the material did not constitute legal advice given to the SBR team, or onward communications of the substance of that advice, or because the material was created after the date of the request. The Commissioner has indicated which information he considers to fall outside the scope of the request in the confidential annex to this decision notice.
20. As section 42(1) is a qualified exemption it is necessary 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.

The public interest test

21. Section 2 of the Act sets out the circumstances under which a public authority may refuse a request for information (see Legal Annex). According to this section, where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often referred to as the "*public interest test*".

Public interest arguments in favour of disclosing the withheld information

22. The complainant put forward the public interest arguments that disclosure of the withheld information would inform public debate regarding the SBR and would increase public trust in the quality of government decision-making. DSD accepted these arguments but still maintained that the public interest in maintaining the LPP exemption outweighed that in disclosure of the withheld information.
23. The Commissioner also considers that there is a general public interest in ensuring that DSD is transparent about and accountable for the decisions it has made about changes to its operational and business structures which have an impact on the delivery of its services to the public.

Public interest arguments in favour of maintaining the exemption

24. The DSD outlined its public interest arguments in favour of maintaining the exemption in its detailed response letter to the Commissioner dated 9 February 2010. These can be summarised as follows: -

a. There is a strong public interest in protecting the established principle of confidentiality in communications between legal counsel and their clients, thereby encouraging those clients to seek legal advice in confidence. If that legal advice were to be routinely disclosed, this would be a disincentive to such advice being sought.

b. Legal advice should be fair, frank and reasoned and include a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; if legal advice were to be routinely disclosed there might be a reluctance on the part of DSD officers to seek that advice as it could contain information which may damage their position should it be disclosed to the public. This could lead to the DSD, in the absence of full and proper legal advice, being less able to properly comply with its legal obligations.

c. There is a risk that legal advice may not be as full and frank as it ought to be should it be provided without the reasonable certainty of the legal adviser that it is being provided in confidence. There is then in turn the risk that the value placed on legal advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed.

25. The Commissioner accepts that the arguments in favour of maintaining the exemption in section 42(1) of the Act are relevant in this case. Having established the relevant arguments for and against disclosure the Commissioner has gone on to consider the balance of those public interest arguments.

Balance of the public interest arguments

26. In the Commissioner's opinion there is generally a strong public interest in understanding the reasons for decisions made by public authorities. He also accepts that there is a public interest in the disclosure of information that would inform public debate about actions that have been or are being taken by public authorities and which impact upon the delivery of its services to the public. The Commissioner notes that some information regarding the SBR was available to the general public at the time of the request via DSD's website. In the Commissioner's view that information went some way to informing the public debate regarding changes to DSD's operational

and business structures and to ensuring accountability and transparency. Nevertheless disclosure of the legal advice in this case would assist the public's understanding of the legal issues associated with the SBR and the way in which DSD tackled or approached those issues. Therefore in the Commissioner's view it would still add to the public's understanding of the issues connected to the SBR and therefore the arguments in favour of disclosure are deserving of some limited weight.

27. However, the Commissioner also accepts that the established public interest arguments in protecting legal professional privilege will always have significant weight. This is because of the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court Case of *DBERR v Dermot O'Brien* [2009] EWHC 164 (QB) who said:

"Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)... The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (para 53)

28. In this particular case the Commissioner considers that the arguments in favour of maintaining the exemption have additional weight given that the SBR was ongoing at the time of the request and the withheld advice was therefore recent and being actively relied upon by DSD to inform its decisions.

29. When considering the balance of the public interest arguments the Commissioner has noted the Tribunal case of *FCO v Information Commissioner (EA/2007/0092)*. At paragraph 29 of that case the Tribunal made the following comments about the type of public interest that was likely to undermine the maintenance of the exemption.

"What sort of public interest is likely to undermine the maintenance of this privilege? There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it obtained."

30. It has not been suggested that DSD is misrepresenting or ignoring the advice it has received. Furthermore, the Commissioner has already indicated the he considers the arguments in favour of maintaining section 42(1) in this instance have substantial weight. Therefore, although he accepts that, in this case, the arguments in favour of disclosure are deserving of some limited weight, he is not persuaded that they are sufficient to outweigh the significant arguments in favour of maintaining section 42(1). When balancing the arguments on either side he has also noted the Tribunal's comments in paragraph 30 of the case mentioned in the preceding paragraph, that:

"the interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go. Disclosure of privileged opinions is not a substitute for legal aid."

31. In view of the above the Commissioner has concluded that the public interest in maintaining the section 42(1) exemption outweighs the public interest in disclosing the information.

Section 35(1)(a) – formulation or development of government policy.

32. The Commissioner notes that DSD relied upon the exemptions under section 35(1)(a) and section 42(1) as a basis for non-disclosure of the withheld information. As the Commissioner believes that the entirety of the withheld information within the scope of the request has been properly withheld under section 42(1) it has not been necessary to consider DSD's arguments in relation to section 35(1)(a) further in this decision notice.

Procedural Requirements

Section 17: refusal notice

33. Section 17(1) provides that: -

" 1) 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”.

34. In its refusal notice the DSD provided the complainant with most of the requested information and stated that it was relying on section 35(1)(a) of the Act to withhold the remainder of the information. In its internal review letter it cited sections 35(1)(a) and 35(1)(c) of the Act as a basis for its refusal to disclose the withheld information. It later made representations to the Commissioner as to why the information should be withheld under section 42(1) of the Act.
35. In order to comply with the requirements of section 17 the DSD should have in fact specified in its refusal notice all of the exemptions it was seeking to rely on, together with the relevant subsections. By failing to cite section 42(1) in its refusal notice the Commissioner considers that the DSD breached section 17(1)(b) of the Act. In failing to state why the exemption under that section applied, the Commissioner considers that the DSD also breached section 17(1)(c) of the Act.
36. 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, or*
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*
37. In this case the Commissioner considers that DSD did not provide the complainant with an explanation as to why the public interest in favour of maintaining the exemption outweighed the public interest in disclosing the information within the statutory time for compliance. In both DSD’s initial response to the complainant and the internal review

response later provided, DSD only made public interest arguments in favour of non-disclosure of the withheld information. It was not until the Commissioner's intervention that DSD produced evidence of having carried out a proper balancing exercise as required under the Act. Therefore the Commissioner finds that DSD breached section 17(3)(b) in failing to provide details of its public interest considerations.

The Decision

38. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- DSD correctly relied upon the exemption under section 42(1) of the Act;

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- DSD breached sections, 17(1)(b) and 17(1)(c) in failing to specify that section 42(1) applied in its refusal notice or explain why that was the case. It also breached section 17(3)(b) of the Act as it failed, within the statutory time limit, to provide the complainant with a notice stating its reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed that in disclosing the withheld information.

Steps Required

39. The Commissioner requires no steps to be taken.

Right of Appeal

40. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 8th day of June 2010

Signed

**Jo Pedder
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

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.”

Public interest test

Section 2 provides that -

“(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

...

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Refusal of Request

Section 17 provides that –

1) 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.

“(3) 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—

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Legal Professional Privilege

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.”