

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 February 2010

Public Authority: Financial Services Authority
Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Summary

The complainant requested information that comprised of an internal legal advice and related documents generated by the Financial Services Authority (FSA). The FSA confirmed it held the requested information but relied on section 42 (legal professional privilege) not to communicate it to the complainant. The Commissioner finds that section 42 is engaged and that the public interest test favours the maintenance of the exemption.

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 Financial Services Authority (FSA) is an independent non-governmental body, given statutory powers by the Financial Services and Markets Act 2000 (FSMA). The FSA is responsible for making or approving the rules covering the operations of the Financial Ombudsman Service (FOS) including time limits for referring cases to the FOS. Generally as regards civil actions in the courts, there is usually an overall "long-stop" requirement that the matter complained about should have happened within the last 15 years. The FSA did not apply this limitation to complaints to the FOS. In essence, the FSA maintains that the FSMA expressly requires the FSA to make rules governing the time limits for complaints to be entertained by the FOS, but that the FSMA does not require the

FSA to apply the Limitation Act to such rules. The complainant does not agree with this interpretation and application of the law by the FSA.

3. The complainant had made an earlier information request (dated 17 January 2008) to the FSA for “all of the information” relating to the minutes of the meeting regarding the 15 year longstop discussion. The FSA refused that request and in doing so, one of the exemptions it relied upon was section 42 (legal professional privilege) .The complainants requested the FSA to review its original decision. After reviewing its decision the FSA informed the complainant that they would waive legal professional privilege and cease to rely on section 42. In doing so they informed the complainant that the waiver only applied to the information in the specific minute of the meeting and did not extend to any other legal advice they held on the 15 year long-stop issue. The minute (titled “FOS – 15 Year Rule” and dated the 18 September 2003) was then released to the complainant. In that minute it said that internal legal advice “advises that the way in which schedule 17, paragraph 13 of the FSMA is framed suggests that Parliament intended the FSA to be able to set times which can differ from those in the Limitation Act”.

The Request

4. On 17 March 2008 the complainant requested the legal advice referred to in paragraph 2 of the FSA Board minute dated 18 September 2003. The reference being that FSA’s internal legal advice “ ... advises that the way in which Schedule 17, paragraph 13, of the FSMA is framed suggests that Parliament intended the FSA to be able to set limits which can differ from those in the Limitation Act”.
5. The FSA, in a letter dated 3 May 2008, refused disclosure by reference to section 42 of the Act, explaining that the information was legally privileged and that the public interest test weighed in favour of the maintenance of the exemption (i.e. non disclosure). The complainant requested a review of the decision by way of a letter dated 5 March 2009. The FSA’s review upheld the original decision; this finding was conveyed to the complainant in a letter dated 22 April 2009.

The Investigation

Scope of the case

6. On 29 April 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

7. On commencing the investigation the Commissioner, in a letter dated 5 June 2009, requested that the FSA provide him with a copy of the withheld information; this the FSA did under a cover of a letter dated 17 July 2009. This information consisted of a document claimed by the FSA to be an internal legal advice and

internal correspondence regarding or connected to that advice. During the investigation the Commissioner invited both parties to make any submissions for him to consider.

Analysis

8. Section 1 of the Act establishes a right to know by placing two related obligations on public authorities. Firstly, when an applicant requests information, a public authority has a duty to write to the applicant saying whether it holds the information. This is known as the duty to confirm or deny. Secondly, if the authority does hold the information it must communicate it to the applicant unless an exemption to that obligation applies.

Exemption – Section 42(1)

9. The FSA relied on section 42 of the Act not to communicate to the complainant information claimed by the FSA to be an internal legal advice and internal correspondence regarding or connected to that advice.

10. 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.’

11. Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI 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 their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph. 9)

12. There are two types of privilege: litigation privilege and legal advice privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. 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 sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. The Information Tribunal in the case of *Calland and the Financial Services Authority (EA/2007/0136)* noted that in-house legal advice or communications between in-

- house lawyers and external solicitors or barristers also attracts legal professional privilege.
13. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to 'advice privilege' the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
 14. The Commissioner's view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is capable of attracting legal professional privilege. This is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information.
 15. The withheld information clearly consists of legal advice from in-house lawyers at the FSA to their colleagues and information seeking or discussing that advice. The Commissioner finds that the requested information attracts legal advice professional privilege and the exemption provided by section 42 of the Act is therefore engaged.
 16. As section 42 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.

Public interest arguments in favour of disclosing the requested information

17. Factors that weigh in favour of the public interest in releasing the information are
 - There is a presumption in favour of disclosure under the Act
 - It would foster transparency, accountability and public understanding of the FSA's actions as regards the setting of time limits for referring cases to the FOS.
 - A significant amount of people are affected by the FSA's actions
18. In addition to the factors for disclosure the Commissioner considered at length further arguments made by the complainant in his letter to the FSA dated 5 March 2009 and in more recent correspondence to the ICO. As explained above the FSA had previously disclosed the minute titled "FOS – 15 Year Rule ". The Commissioner therefore considered, in the context of the public interest test, whether it could be said that the FSA public statements as contained "FOS – 15 Year Rule" minute are incongruous with the withheld information.

Public interest arguments in favour of maintaining the exemption

19. The Information Tribunal, in *James Kessler QC v Information Commissioner* (EA/2007/0043), laid out with clarity (at paragraph 60) the following public interest factors in favour of maintaining the exemption at section 42:

- “a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.
- b. If legal advice were routinely disclosed, there would be disincentive to such advice being sought and/or as a disincentive to seeking advice based on full and frank instructions.
- c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between a public authority and its legal advisers.
- d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.
- e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced.
- f. There is a significant 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.”

Balance of the public interest arguments

20. The Commissioner specifically considered in depth the arguments raised by the complainant that were predicated on the Information Tribunal's decision in Mersey Tunnel Users Association and the Information Commissioner and Merseytravel (EA/2007/0052). The case concerned the operator's (now Merseytravel) running of the Mersey Tunnel at a loss in the 70's and 80's with the deficit being made up from a levy on the five district councils of Merseyside. In the 1990's the Tunnel became profitable and in August 1994 the operators sought legal advice as to whether they should use the profits to reduce the tolls, thus benefiting toll users, or alternatively whether the funds should be used to repay district councils and therefore benefit a wider cross-section of Merseyside. The operators adopted the latter option. The Tribunal felt the lack of transparency in Merseytravel's actions and reasons was “crucial” in reaching their conclusion. For example, Merseytravel indicated on their website that they had a legal duty to repay the district councils and yet could offer no statute to support this so-called legal duty and instead referred to the legal advice in question. The Tribunal also noted that the repayments had not always been clearly identified in the annual accounts which would thwart proper scrutiny and a fully informed public debate about Merseytravel's operation and again demonstrated a lack of transparency in the financial dealings of this public authority.
21. The complainant maintains that a large number of people are adversely affected by the FSO's failure to have a "long-stop" requirement that the matter complained

about should have happened within the last 15-years. The complainant avers that from 2000 to 2008 FOS received 674,118 complaints; 287,947 related to mortgage endowments. During 2007/8 it received 123,089 complaints; 13,778 related to mortgage endowments. The complainant maintains that 9,000 complaints to the FSO, of which 7,000 related to mortgage endowments, would have been time-barred in 2007/08 alone if a 15-year long stop had been in place. The people (essentially financial advisors) who are adversely affected are those who have to answer to those 9,000 complaints that would have been time barred in 2007/08 for example.

22. The Commissioner view is that the number of people affected and the extent to which the disclosure of the minute might misrepresent the legal advice are arguments which affect the amount of weight to be given to the public interest test in favour of disclosure so as to provide transparency and accountability about an issue that affects a significant number of people. The Commissioner is aware that the Mersey Tunnels case concerned all the users of the Mersey Tunnel. This amounted to approximately 80,000 people per weekday and to a lesser extent all the council-tax paying residents of the five districts of Merseyside (approximately 1,485, 900 people). These numbers of people significantly outnumber the people adversely affected here. This difference between this case and the Mersey tunnel case mean that the weight in favour of disclosure is not as significant as in the Mersey tunnel case. The Commissioner also takes into account a further distinction between that matter and this. In the Mersey Tunnel case a factor for disclosure was the lack of clarity as to the legal authority for the public authority to pursue a particular course of action. Here the issue has been argued before the High Court and the Court of Appeal ([2009] EWCA Civ 593) with the finding in favour of the FSO. The legal basis for the FSO decision (re “the longstop”, see “Background” above) is greatly disputed; however it is known, if not accepted, by the complainant
23. The Commissioner notes that the Information Tribunal, in the case of Boddy –V- ICO stated that where a public authority are misleading the public or acting unlawfully then this “...*would be likely to be a significant factor in favour of disclosure...*” In this context the Commissioner has also considered that the FSA previously divulged, in a very short summary, previous legal advice. However the Commissioner found nothing untoward or underhand or any other incongruity with what was previously divulged and the legal advice it now retains by way of section 42 of the Act.
24. The Commissioner considers the passage of time favours disclosure. This position is based on the principle that if advice has been recently obtained, it is likely to be used in a variety of decision-making processes (i.e. allowing the client to determine a course of action/issue court proceedings/raise challenges through other channels, e.g. ombudsman). The Commissioner recognises that these processes would be likely to be affected by disclosure. However the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of a decision making process. This may mean that any harm to the privilege holder is slight and gives weight to arguments in favour of disclosure.

25. The definition of 'recent' will very much depend on the specific circumstances as in some cases advice can remain relevant for a long time whilst in others it may be less relevant where legislation and case law have changed rapidly, for example, advice which was weeks old was described as "relatively recent" in *Kessler v Ministry of Defence* ([EA/2006/0044](#)) whilst advice which was 6 years old was described as "still relatively recent" in *Kitchener v Derby City Council* ([EA/2006/0044](#)) whereas in *Mersey Tunnel Users Association v Merseytravel* ([EA/2007/0052](#)), advice which was over 10 years old was considered "not recent".
26. Advice is live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted based on that advice. To disclose legal advice where litigation is in contemplation or in prospect would be to upset the delicate balance of fairness between legal adversaries. Also legal advice may not only consider legalities but also tactical and non-legal issues and it would be unfair to require a public authority to reveal its advice whilst their (private) opponent would not be so compelled.
27. Applying the considerations laid above the Commissioner notes that the legal advice information (dated July 2003) was requested by the complainant on 17 March 2008. The Commissioner considers that the "live and recent" arguments affect the amount of weight to be given to the public interest in favour of maintaining the exemption so as to ensure that clients are able to obtain full and proper legal advice. The more recent and live the advice is, the greater the public interest in favour of maintaining the exemption. In this case the advice is still live (although not very recent) which means that considerable weight should be afforded to the public interest in favour of maintaining the exemption.
28. Notwithstanding the strength of the complainant's arguments the factors for the release of the information are, in the Commissioner's view, significantly outweighed by those factors in favour of the maintenance of the exemption as outlined above. There is a marked public interest in ensuring that public authorities, as is the case here, are able to obtain legal advice that is not tainted with the fear that it may be disclosed in the future. Similarly this case highlights that the public interest is well served by enabling a public authority to utilise internal legal advice that is freely and frankly given in the knowledge that it is not likely to be routinely disclosed. It is therefore the Commissioner's decision that the public interest favours the maintenance of the exemption thus section 42 of the Act (for the reasons discussed above) prevents the disclosure of the requested information.

Procedural Requirements

29. Any information which the public authority is required to release must be disclosed to the applicant within the 20 working day time limit as proscribed by section 10(1) of the Act. Where the authority is relying on one or more of the exemptions and is withholding information, it must issue a Refusal Notice (under section 17 of the Act) within the same timeframe, specifying the exemption and why it applies. In this case, the complainant made his request on 17 March 2008.

The FSA did not provide its refusal notice until 3 May 2008, 34 working days later. This delay places them in breach of the section 17 (1) of the Act.

The Decision

30. 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:
- In its application of section 42 not to disclose the information that consisted of an internal legal advice emanating from its own "in-house" lawyer and documents seeking or discussing that advice.
31. The Commissioner's however finds that the public authority dealt with the following elements of the request not in accordance with the requirements of the Act:
- Their delay in providing the complainant with the refusal notice places them in breach of section 17 (1) of the Act

Steps Required

32. The Commissioner requires no steps to be taken.

Right of Appeal

33. 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 served.

Dated the 23rd day of February 2010

Signed

**Lisa Adshead
Senior FOI Policy 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.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Refusal of Request

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.”

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.”