

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 3 August 2010**

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

### Summary

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The complainant requested information from the Ministry of Justice (MOJ) about the issue of 'third party capture' by liability insurers. The authority provided some information in response to the request. However, it refused to provide a copy of the legal advice passed to the MOJ by the Financial Services Authority further to an Exemption Order under the Compensation Act 2006 that the MOJ was making at the time. In withholding the information, the MOJ claimed that section 42 of the Freedom of Information Act 2000 applied. The Commissioner considers that the MOJ was correct to cite section 42(1) and that the public interest favours maintaining the exemption. Nevertheless, the Commissioner has found that the MOJ breached section 10(1) in its handling of the request.

### 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.

### Background

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2. The request that forms the subject of this notice concerns the legislative regulation of the insurance issue of third-party capture. To

quote the factsheet published by the Financial Services Authority (FSA), entitled *"Third-party capture – what you need to consider"*:

*"Third-party capture or (third party assistance) is when an insurer deals directly with a person who has a potential claim against their policyholder, in order to investigate and settle the claim. Typically, an insurer offers a compensation payment to settle the claim directly to a third party, rather than settling through a legal representative for that party. This is mainly used for third-party motor claims. But sometimes it's used in other types of insurance, such as employers' liability.*

*Concerns have been raised by industry bodies and consumer groups that this practice could mean third parties do not receive fair and reasonable treatment and compensation."*

3. At present, third-party capture is regulated under the Financial Services and Markets Act 2000 (FSMA). However, in 2006, the Ministry of Justice (MOJ) undertook a consultation process seeking views on *"key aspects of the regulation claims management services under part two of the Compensation Act 2006."* This included considering whether the legislation should cover third-party capture.
4. Although the MOJ received a number of submissions on this matter, the FSA has clarified that the activity was regulated by the FSMA and so should be exempted from the Compensation Act 2006. Instead, the FSA pledged to consider any evidence suggesting impropriety on the part of authorised firms.
5. Subsequently, the chairman of the Motor Accident Solicitors' Society, Mr Tony Goff, has spoken out about the practice of third-party capture, arguing that liability insurers should never have been excluded from the provisions of the Compensation Act 2006 as the FSA has *"neither the will nor the power, let alone the desire and resources, to police liability insurers."*

## The Request

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6. On 15 December 2008, the complainant submitted four requests to the MOJ about third-party capture. However, it is only item 1 that the complainant has asked the Information Commissioner to consider:

*"In 2006 you (then Department for Constitutional Affairs) carried out a consultation on key aspects of the regulation of claims management services under part 2 of the Compensation Act. You reported on that consultation in November 2006.*

*Question 4 in that consultation was:-*

*"Is it appropriate to exclude third party capture by liability insurance companies?"*

*Please provide a copy of DCA/MOJ's correspondence (including emails) with the FSA in relation to this issue during the period July to November 2006. Please also provide notes of any meetings or parts of meetings where the issue of third party capture was discussed with the FSA or its representatives within this time period, together with any internal memoranda of the DCA/MOJ created in relation to the issue of third party claims by liability insurers."*

7. The MOJ responded to the request in correspondence dated 12 February 2009, initially apologising for the delay incurred. The authority provided an email exchange between officers at the FSA and officials in the DCA (now the MOJ) which clarified the regulatory position with regard to third-party capture and enclosed copies of two letters concerning claims management regulation in the Compensation Act 2006. The authority also indicated that it did not hold any records of meetings between the MOJ and FSA where third party capture was discussed, or internal memoranda created in relation to third party claims.
8. However, with regard to *"other correspondence (including emails)"* captured by the request, the MOJ claimed that information was subject to legal professional privilege and therefore fell under the exemption to disclosure afforded by section 42 of the Act. As required, the MOJ went on to consider the public interest in the release of the information but found that it favoured the maintenance of the exemption.
9. In its correspondence of 9 April 2009, the complainant appealed the MOJ's decision to withhold requested information on four principal points, these being:
  - That the legal advice in question was sought by the FSA for its own use and only subsequently shared with the MOJ. Therefore, the client / lawyer relationship, on which legal professional privilege is predicated, was not present.
  - That the authority's assertion that it needed to preserve the space for free and frank exchange of views between the MOJ and the FSA as two bodies responsible for policy, is not an interest which relates to legal professional privilege.
  - That the FSA's view of the legal position in respect of the regulation of insurers has been published by both the MOJ and the FSA. Furthermore, the sensitivity of the legal advice would seem to have

- diminished given that it was publication was effected more than two years ago.
- That as *"different emanations of Government"*, it was *"deeply unattractive"* for the MOJ to argue that a level of secrecy had to be maintained between the MOJ and the FSA.
10. The MOJ informed the complainant, in its letter of 10 July 2009, that it had reviewed its refusal but had upheld its original decision. It confirmed that the MOJ and FSA did not have a lawyer / client relationship but, nevertheless, was of the opinion that section 42 applied.

## The Investigation

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### Scope of the case

11. On 7 September 2009 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant specifically asked the Commissioner to consider whether the MOJ was entitled to rely on section 42 to refuse to provide requested information. As part of its submission, the complainant set out arguments detailing why it believed the information should be disclosed and enclosed a briefing on the issue of third-party capture.
12. In his referral to the Commissioner, the complainant also doubted whether the authority had been sufficiently rigorous in its search for information captured by all parts of his request. However, the complainant has subsequently informed the Commissioner that his investigation be confined to the MOJ's application of section 42 of the Act.
13. In providing the withheld information to the Commissioner, the MOJ initially included copies of four emails sent between FSA officials between 1 September and 14 September 2006. The MOJ has since clarified that two of these emails, dated 1 September 2006 and 4 September 2006, were not concerned with the issue of third-party capture and so would not fall within the scope of the request.
14. It is evident that both of these emails were sent in connection with discussions taking place about the drafting of an Exemption Order under the Compensation Act 2006. However, the Commissioner is satisfied that the content of the emails does not concern third-party capture. He has therefore removed these emails from the scope of his decision.

15. The Commissioner would also note that the advice that the MOJ considered subject to legal advice privilege was contained in an FSA email dated 6 September 2006. As well as commenting on third party capture, the FSA's legal adviser also referred to other issues that would fall outside the scope of the request.
16. In passing this advice to the DCA, the FSA embedded a copy of the email of 6 September 2006 in its email of 14 September 2006. The Commissioner has considered whether it would be appropriate to release any part of this later email. However, he considers that as the substantive content of the email is the FSA advice, to redact this information would render the remaining information meaningless. He has, in effect, therefore treated both emails as subject to the section 42 exemption.

### **Chronology**

17. The Commissioner wrote to the MOJ on 3 October 2009 asking that it provide copies of the withheld information for his consideration. This was duly sent by the authority on 27 October 2009, consisting of copies of a string of emails.
18. In his correspondence of 11 December 2009 addressed to the complainant, the Commissioner set out his understanding of the matter and asked the complainant to confirm which aspects of the case he wished to pursue.
19. The complainant replied on 25 January 2010. He indicated that the Commissioner focus on whether the MOJ was entitled to rely on section 42 for withholding information and asked that the Commissioner take into account the arguments presented in his letter of 7 September 2009.
20. On 1 February 2010, the Commissioner telephoned the MOJ about the potential applicability of section 42 to each of the emails previously provided. Upon consideration, the MOJ emailed the Commissioner on 3 February 2010 stating that it only considered a limited amount of the information would be captured by the scope of the request.

## Analysis

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### Substantive Procedural Matters

#### Section 10 - time for compliance

21. Section 10(1) of the Act requires that a public authority respond to a request promptly, and in any event, not later than the twentieth working day following the date of receipt. By failing to conform to this time-frame in responding to the request, the Commissioner finds the MOJ to have breached section 10(1).

### Exemptions

#### Section 42 – legal professional privilege

22. The full text of section 42 is available in the Legal Annex at the end of this notice.
23. Broadly speaking, legal professional privilege protects the confidentiality of communications between a lawyer and a client. There are two types of privilege – litigation privilege and legal advice privilege. Advice privilege will apply where no litigation is in progress or being contemplated but the communications are:
  - confidential,
  - made between a client and a professional legal adviser acting in their professional capacity; and
  - made for the sole or dominant purpose of obtaining legal advice.
24. For the avoidance of doubt, the Tribunal in the case of *Calland and the Financial Services Authority (EA/2007/0136)* confirmed that in-house legal advice or communications between in-house lawyers and external solicitors or barristers also attracts legal professional privilege.
25. In this case, the legal advice relates to an Exemption Order under the Compensation Act 2006 that the MOJ was making at the time. Further to an earlier meeting, and the provision of draft exemption regulations, an in-house FSA lawyer (the professional legal adviser) set out his advice clarifying the current position on third party capture to officials at the FSA (the client), in an email of 6 September 2006. The Commissioner is satisfied that all three conditions set out at paragraph 23 are met and that the advice would be subject to advice privilege.

26. The complainant, however, has argued that the relationship between the FSA and MOJ would preclude the possibility that legal professional privilege would be maintained through the exchange of the advice.
27. In responding to the request, the MOJ directed the complainant to the Information Tribunal's findings in *Adlam v the Information Commissioner and HM Treasury (EA/2006/0079)* to reinforce its view that it is irrelevant whether the public authority receiving the information is the person by whom the claim of privilege is maintained. However, as that case involved two different government departments whereas the FSA is a non-departmental public body, the complainant has questioned whether the claims to legal professional privilege can be considered analogous.
28. In the first place, the Commissioner would disagree with the complainant that, in principle, the FSA's status as a non-departmental public body would affect any claim to privilege. Nevertheless, he has gone on to consider circumstances where privilege may be dropped - notably where privilege has been waived or there has been a loss of confidentiality - and whether either of these would apply here.
29. The Commissioner considers that in the circumstances of this case there is no issue about waiver of privilege. The only disclosure of the advice was to another public authority (MOJ) for a specific and limited purpose relevant to its own functions. There has never been any suggestion that the advice was shared more generally or disclosed to a wider audience, for any extraneous purpose.
30. The Commissioner has therefore moved on to examine whether the provision of the legal advice to the MOJ means the communication is no longer confidential. For confidentiality to be maintained, it must be considered that the legal advice was provided to a specific party for a specific purpose with restrictions imposed on its further use.
31. In this instance, it is clear that there would be significant overlapping interests between the FSA and the MOJ in the drafting of an exemption order, where the sharing of legal advice would be useful. The Commissioner is therefore satisfied that the provision of the advice to the MOJ had a specific purpose, namely to help guide it when considering what should be contained in the Compensation Act 2006.
32. However, the Commissioner would note that he has not been presented with any evidence that the FSA expressly commented on the confidentiality of the information or imposed any restrictions on its use. Nevertheless, the Commissioner considers that such confidentiality was implied and therefore takes the view that the simple process of passing

on the advice would not serve to undermine the broader principle that privilege continued to attach to the information.

33. The Commissioner is therefore satisfied that the section 42 exemption applies. However, it is a qualified exemption and is therefore subject to the public interest test under section 2(2)(b). This states that the duty to provide information in section 1(1)(b) does not apply if, or to the extent that, in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has therefore gone on to consider the public interest arguments both for and against the release of the requested information.

### **The public interest**

34. The principle of legal professional privilege is based on an established and widely accepted notion that a legal confidence should be preserved. As a general steer for his assessment, the Commissioner has found it instructive to refer to the Information Tribunal's findings in Calland, which sets out a prelude to the public interest test in the context of legal professional privilege:

*"The general public interest in disclosure of communications within public authorities has been referred to, usually under the headings of 'transparency' and 'informing the public debate', in a number of decisions of this Tribunal. What is quite plain from a number of decisions...is that some clear, compelling and specific justification for disclosure must be shown so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."*

### **Public interest arguments in favour of disclosing the requested information**

35. In the complainant's request, he refers to the consultation papers issued by the MOJ (then DCA) in 2006. These sought, among other things, views of key aspects of claims management services under part two of the Compensation Act 2006. As background, the Compensation Act 2006 was intended to *"tackle poor practice in the claims management sector and provided additional safeguards for the public against rogue companies."*
36. As part of this consultation the MOJ asked *"Is it appropriate to exclude third party capture by liability insurance companies? It would be helpful to have evidence to support any arguments."*



37. In its summary of responses, the MOJ provided a précis of the arguments put forward by a number of interested parties, including representatives of the insurance industry. At paragraph 57 of the document, it set out the groups in favour of including third party capture under the Compensation Act 2006:

*“By contrast consumer groups, trade unions, claimant solicitors and the Law Society expressed universal support for including third party capture within scope of claims management regulation. The principal arguments given to support inclusion were:*

- i. Liability insurers are primarily responsible to their policy holders and shareholders, creating a conflict of interest which overrides any duty to a third party (under Law Society rules solicitors are not permitted to represent both parties).*
- ii. There is strong evidence of consumer detriment.*
- iii. The claimant is denied access to legal representation of their own choice, and is frequently not advised of their right to seek independent advice.*
- iv. The status quo provides inadequate safeguards for consumers – the FSA does not regulate third party capture and the requirement to have regard to certain principles is unenforceable.*
- v. Consumers do not receive the compensation they deserve because they put forward low first offers to captured third parties, which without the benefit of independent legal advice are often accepted.*
- vi. Excluding third party capture would mean that not all businesses in the claims sector are competing on a level playing field.*
- vii. The credibility of the new regulatory regime will be jeopardised if third party capture is excluded.”*

38. As evidenced above, the Commissioner recognises that there is a significant level of concern about the issue of third-party capture and the treatment that claimants may receive as a result of this practice. Although the Commissioner is unaware of the numbers of people affected by the practice, it would not seem to be insignificant and the issue has generated a considerable amount of public debate.

39. It has been suggested both by the complainant and in the consultation responses that the current regulation of third-party capture under the FSMA by the FSA is not sufficiently robust. There is therefore a clear public interest in understanding why a decision was made to exclude third party capture from a piece of legislation that may have proved more effective.

40. The Commissioner is also mindful that both the FSA and the MOJ has published its views on the regulation of insurers. While the

Commissioner does not consider such publication to amount to a waiver of legal advice privilege, he does consider that the FSA has committed itself to minimising the risks to claimants. To disclose the requested legal advice could therefore potentially serve to inform public debate about why it was thought inappropriate to transfer the regulation of third party capture in the first instance.

41. The complainant has gone further by stating that the MOJ's argument that it needs to preserve a confidential relationship with the FSA to encourage candour and frankness is, as referenced in paragraph 9, *"deeply unattractive"* given the implied secrecy between *"different emanations of government."*
42. The Commissioner has also considered additional arguments that the complainant believes support the public interest in releasing the information. Although only briefly touched upon, he has implied that on the back of the legal advice, the public has been given misinformation and possibly even been misled on the subject. The issue of misrepresentation was addressed in the Information Tribunal case involving the *Foreign Commonwealth Office v the Information Commissioner (EA/2007/0092)*.
43. In its ruling, the Tribunal considered occasions where the public interest would be likely to 'trump' the preservation of legal professional privilege, with the Tribunal commenting that:  
  
*"The most obvious cases would be those that there is reason to believe that the authority is misrepresenting the advice 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."*
44. The Commissioner, however, has not been presented with any evidence that would support the complainant's suspicions of misrepresentation.

### **Public interest arguments in favour of maintaining the exemption**

45. The Commissioner considers that there will always be an initial weighting in favour of maintaining legal professional privilege due to its importance as a concept, namely safeguarding the right of any person to obtain free and frank legal advice.
46. This position was endorsed by Mr Justice Williams in the High Court case of the *Department for Business, Enterprise and Regulatory Reform v Dermot O'Brien (EWHC 164)*, who remarked:

*"[legal professional privilege] cases are different simply because the in-built public in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise..."*

*The in-built interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight."*

47. In this regard, the Commissioner believes that a public authority should have the right to seek and share advice which may help clarify a regulatory position. A critical part of this process will involve that authority taking stock of what the implications of a regulatory overhaul may be.
48. The MOJ has argued, and the Commissioner agrees, that there is a strong public interest in protecting the established principle of confidentiality in communications between legal advisors and their clients. In dealing with controversial matters, an authority needs to be able to take legal advice in confidential circumstances in order to inform its decisions. It should also have the freedom to share the knowledge it has obtained with specific partners where this may be beneficial, without fear that privilege may be diminished. To restrict the usage of legal advice in such a way would be to adversely affect any spirit of co-operation between public bodies.
49. In this case, there is a real and significant public interest in preserving the MOJ's ability to draw from full and frank legal advice obtained from the FSA. This ensures that it can take decisions regarding this contentious issue that are compliant with the law and that are based on fully informed and thorough legal advice.
50. The Commissioner would add that he is not convinced by the complainant's argument that as the legal position of both the MOJ and FSA was published just over two years ago (at the time of the request), this would considerably strengthen the case for disclosure.
51. The Commissioner acknowledges that the age of the legal advice will serve as a public interest consideration. As a principle, 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. However, in this instance, the Commissioner would consider the legal advice to be recent and therefore the public interest in maintaining the legal professional privilege exemption has not been significantly eroded by the passage of time.

## **Balance of the public interest arguments**

52. The Commissioner acknowledges that the issue of third party capture is important, not least because of the damaging effects that a lack of regulation may have.
53. However, the Commissioner is conscious of the weight invested in legal professional privilege, particularly the breaching of a trust between parties that may go on to undermine the possibility of frank and candid discussions. When taking this into account, the Commissioner takes the view that the public interest in maintaining the exemption outweighs the public interest in disclosure.
54. Following the reasoning set out by the Tribunal in Calland, the Commissioner has concluded that there is an absence of clear, compelling and specific justification for disclosure in the submissions.

## **The Decision**

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55. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act by claiming that the withheld information was exempt by virtue of section 42(1) of the Act.
56. However, the Commissioner has also decided that the public authority breached section 10(1) by failing to comply with sections 1(1) and 17(1) of the Act within the statutory time frame.

## **Steps Required**

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57. The Commissioner requires no steps to be taken.

## Right of Appeal

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58. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 3<sup>rd</sup> day of August 2010**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**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

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- (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.”

### Effect of Exemptions

**Section 2(2)** provides that –

“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 –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

### 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."

**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."