

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 December 2010

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested a copy of the legal advice given to the Home Secretary regarding the extradition of a named individual to the United States of America. The public authority explained that it held the information, but that it was unable to disclose it by virtue of section 42(1) (legal professional privilege). It explained that it believed that the public interest in maintaining the exemption was greater than the public interest in disclosure. It maintained its view after being asked to conduct an internal review. The Commissioner has considered this case and has determined that the public authority was entitled to rely upon section 42(1) and that the public interest favoured withholding the information in this instance. He has therefore not upheld the complaint.

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 named individual to whom the requested information relates was accused of unauthorised access between February 2001 and March 2002 from his home computer in London into 97 US Army, Navy and NASA computers concerned with national defence, security and naval

munitions supplies. His extradition to stand trial in the United States of America was approved.

3. On 26 November 2009, after various legal applications, the then Home Secretary, Alan Johnson, made his final decision not to halt the extradition.
4. Papers were lodged with the High Court on 10 December 2009 seeking judicial review of the Home Secretary's decision not to block the extradition. On 12 January 2010, the High Court agreed to conduct another judicial review of the Home Secretary's decision. On 20 May 2010, the new Home Secretary, Theresa May, agreed to an adjournment in this case in order to consider the matter again.

The Request

5. On 3 August 2009 the complainant requested the following information from the public authority in accordance with section 1(1) of the Act:

'I wish to make an application under Freedom of Information for a copy of the legal advice given to Home Secretary Alan Johnson regarding the extradition of [the named individual] to the United States.'

6. On 26 August 2009 the public authority provided a response to the request. It explained that it held the information. However, it stated that the information was exempt by virtue of section 42 of the Act, and provided a detailed public interest test. It also provided the text of a published letter explaining its overall position in this matter.
7. On 3 September 2009 the complainant requested that an internal review was provided in respect to this request. He explained that he believed that the public interest favoured disclosure given the circumstances of this case.
8. On 2 November 2009 the public authority communicated the results of its internal review. It stated that section 42(1) was being applied and apologised for not citing the correct subsection in the refusal notice. It upheld the original decision.

The Investigation

Scope of the case

9. On 4 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. On 5 January 2010 he agreed that the scope of the Commissioner's investigation would be:
 - to determine whether section 42(1) can be applied to the information that is being withheld that is covered by the request dated 3 August 2009, or whether this information can be disclosed to the public.
11. The legal advice in question is that received up to the date of the request, which was made on 3 August 2009.

Chronology

12. On 25 November 2009 the Commissioner wrote the public authority to explain that he had received this complaint. He asked to be provided with a copy of the withheld information for the purposes of his investigation.
13. On 7 December 2009 the public authority provided the Commissioner with a copy of the withheld information. It confirmed that it had not waived its right to rely on legal professional privilege in respect to it and explained the nature of the information.
14. On 17 December 2009 the Commissioner wrote to the complainant. He asked for him to confirm the scope of the investigation, to provide a copy of his internal review request and to provide any further arguments about why he believed that the public interest favoured disclosure in this case. He also explained the operation of section 42(1).
15. On 5 January 2010 the complainant confirmed the scope of the Commissioner's investigation. He also provided the Commissioner with a copy of his internal review request and explained that the arguments contained within it were his arguments about why the public interest favoured disclosure. He also explained his view that there was a continuing huge public interest in the case and specifically that there was a direct contradiction between the powers claimed by the Home Secretary and what three eminent lawyers insist can be done in the circumstances. He explained that it was imperative that the general public had the right to check that the Minister's interpretation was correct.

16. On 14 and 21 January 2010 the Commissioner sought further evidence from the complainant and public authority. The complainant replied on the same day, and the public authority on 18 February 2010.

Analysis

Exemption

Section 42(1)

17. Section 42(1) of the Act is worded as follows:

'Information in respect of which a claim to legal professional privilege...could be maintained in legal proceedings is exempt information'.

18. The application of section 42(1) of the Act was considered by the Information Tribunal in the decision of *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry)* [EA/2005/0023] where legal professional privilege was described 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.' (paragraph 9)

19. The principle of legal professional privilege was considered in detail by the House of Lords in *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* [2004] UKHL 48, where Lord Rodger explained the policy reasons for the principle in respect of legal advice:

'If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing

public interest in making that evidence available. As Lord Reid succinctly remarked in Duke of Argyll v Duchess of Argyll 1962 SC (HL) 88, 93, "the effect, and indeed the purpose, of the law of confidentiality is to prevent the court from ascertaining the truth so far as regards those matters which the law holds to be confidential." (paragraph 54)

Is the exemption engaged?

20. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending, and litigation privilege where litigation is contemplated or pending.
21. The category of privilege which the public authority is relying on to withhold this information is advice privilege. This privilege is attached to communications between a client and their legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. It was considered in detail in the *Three Rivers* case above and it explained that there were three requirements for material to engage legal professional advice privilege. The Commissioner has adopted this approach in this case and these factors can be summarised as follows:
 - it must be between a qualified lawyer in their professional capacity and a client;
 - it must be created with the sole or dominant purpose of obtaining or providing legal advice;
 - it must be confidential.
22. The first requirement is a question of fact. In this case all of the withheld information was between the Home Secretary and a qualified legal advisor. The information was communicated in the legal advisor's professional capacity and in all cases was formal advice. The requirement is therefore satisfied.
23. The second requirement is also a question of fact. The determination of the dominant purpose can usually be found by inspecting the withheld information itself. The Commissioner has examined the withheld information and is satisfied that for all of the documents the sole purpose was obtaining relevant legal advice. The requirement is therefore also satisfied.
24. The third requirement, that the information be confidential, is an issue of law.

25. The complainant argued in his submissions when requesting an internal review that in-house legal correspondence should not engage the exemption as it should not be legally professionally privileged. The public authority explained that the concept correctly extends to in-house lawyers. The Commissioner agrees that this is so.
26. The above issue was also considered by the Information Tribunal in paragraphs 29 to 35 of *Calland v Financial Services Authority* [EA/2007/0136]. It explained that it believed that in-house lawyers deserved the same protection as external ones. The Tribunal stated that:

'Such a result accords with the general policy giving rise to [legal professional privilege]. Just the same requirements for confidentiality and candour exist where an employed lawyer gives advice as when it comes from a member of the independent professions'. (paragraph 35)

27. In the Commissioner's view, the public authority has not waived its privilege in this case. The Commissioner notes that this is a situation of advice privilege. He believes that in circumstances other than litigation, partial disclosure will not result in waiver of legal advice privilege. His view has been confirmed by the Information Tribunal in *FCO v Information Commissioner* [EA/2007/0092] which stated:

'There is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent will see what he is doing and demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate. Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned. Quite different is the position where the parties come to court; if evidence is adduced, it is there to be fully tested or scrutinised in relation to any relevant issue, whether it be witness, document or object.' [at paragraph 22]

28. The Commissioner is satisfied on the facts of this case that there has been no waiver of the privilege, and that the confidentiality of the advice remains. He has therefore gone on to consider the public interest test.

Public interest test

29. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that, for the information not to be disclosable, all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner is only able to consider factors that are relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption, but can consider all public interest factors when weighing up the public interest factors that favour disclosure.

30. It is important to note from the outset is that the Act's default position favours disclosure. Therefore, in the event that the public interest factors are of equal weight, the information should be communicated. It is also important to note that, just because a large section of the public may be interested in the information, that does not necessarily mean that the release of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner* [EA/2006/0007] at paragraph 50).

Public interest arguments in favour of maintaining the exemption

31. In arguing that the public interest favoured withholding this information, the Home Office has highlighted the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals. Furthermore, the Home Office highlighted the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of section 42(1).

32. It explained that government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter-arguments, and as a consequence legal advice may well set out the perceived weaknesses of the Department's position. Without such comprehensive advice, the effectiveness of the Government's decision-making process would be

reduced because it would not be fully informed, and this would be contrary to the public interest.

33. Disclosure of legal advice would produce a significant prejudice to the Government's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.
34. There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is given or make only a partial record. This too would not be in the public interest. If this scenario were taken to its logical extreme, it is possible that there may even be a reluctance to seek legal advice.
35. This could lead to decisions being taken that are legally unsound. Not only would this undermine the Government's decision-making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided. It explained that in its view there is an important public interest in the proper administration of justice and the concept of legal professional privilege plays an important role in maintaining this. It quoted Lord Taylor of Gosforth CJ's dictum on this point in *R v Derby Magistrates Court, Ex p B* [1996] AC 487:

'The principle that runs through all of these cases... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client [in this case, the Home Office] must be sure that what he tells his lawyer in confidence will never be revealed without his consent'.

36. In addition it may be the case that wider considerations about the consequences in other situations will need to be considered. It is proper that the Government is able to consider the wider picture and potentially rely on its advice in the future (both in this case and others). This is a further public interest in maintaining the exemption.
37. Further, in this case the Home Secretary has experienced considerable judicial scrutiny in respect to his position in this matter. The Home Office has stated that paragraphs 64 and 66 of the High Court decision in *McKinnon, R (on the application of) v Secretary of State for Home Affairs* [2009] EWHC 2021 (Admin) (promulgated on 1 August 2009) supports its position and its position reflects its advice. The public

authority believes that the fact that its position had been tested in such a forum enhances the weight that can be put on the public interest in maintaining the application of legal professional privilege in the circumstances of this case.

38. The Home Office concluded that, although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professional privileged material it is likely to be in 'exceptional circumstances' only that this will not outweigh the public interest in disclosure. It explained that the advice was live at the date of the request.
39. The Commissioner acknowledges the strength of the arguments advanced by the Home Office. Indeed, as the Home Office noted in its submissions to the Commissioner, there is a significant body of case law to support the view that there is a strong element of the public interest built into section 42(1). The Information Tribunal in *Bellamy* noted that:

'there is a strong public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'
(paragraph 35)

40. The Commissioner also has some reservations about the force of some of the points advanced by the public authority. The Commissioner does not fully accept the argument that public officials would be less willingly to fully document their requests for legal advice if there were the possibility of disclosure. He does not accept this argument because the Civil Service Code imposes expected standards of professional integrity and he is not convinced that they would be overridden by disclosure. He also agrees with the Tribunal's findings in the case of *Mersey Tunnel Users Association v Information Commissioner and Mersey Travel* [EA/2007/0052] (*the 'Mersey Travel' case*) which stated:

'Nor can we see that any professional lawyer would temper their advice for fear of later publication: that would again be self defeating, to both client and lawyer, to say nothing of the lawyer's professional obligations'. (paragraph 42)

41. Despite these reservations, the Commissioner believes for the reasons given in paragraphs 31 -33 and 35 - 38 above that there should be considerable weight given to the inbuilt public interest factor in

respecting the concept of legal professional privilege on the facts of this case.

Public interest arguments in favour of disclosing the requested information

42. However, it is important to remember that these factors are balanced against the arguments in favour of disclosing the legal advice which forms part of the requested information; Parliament did not intend the exemption contained at section 42 of the Act to be used absolutely. Indeed, the Tribunal's decision in the case of *Mersey Travel* underlines this point. In that case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. In particular, the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore to issues which affected a substantial number of people.
43. In the Commissioner's opinion there is a strong public interest in people understanding the reasons for decisions made by public authorities, or in this case the reasoning behind the Home Secretary's position as outlined by his public statement. Disclosure of the legal advice may assist the public's understanding of why the Home Secretary has made the decision he has.
44. Furthermore, disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good quality legal advice and thus increase public confidence in the Government's position as outlined in the Home Secretary's public statement.
45. In addition there is competing independent legal advice on similar issues that is held by the media and has been considered by the Home Affairs Select Committee. This competing advice was commissioned by the Daily Mail newspaper from Matrix Chambers and was prepared by Tim Owen QC and Julian B. Knowles. It had been written before the request for information was made to the public authority. The disclosure of the withheld information may inform the public and enable either the two pieces of advice to be reconciled, or inspire further consideration should they differ. There is considerable public interest in the public being reassured that the advice is defensible.
46. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids the understanding of, and participation in, the public debate of issues of the day. The Commissioner notes that there has been a very considerable amount of public debate about this issue and there are a lot of people who are interested in the fate of the individual involved in this case; for instance, questions were raised in the House of Commons. Disclosure

of the various pieces of legal advice could allow a more informed debate on these issues, particularly given the complexity of the legal issues concerning the powers of the Home Secretary in this case.

47. In addition the Commissioner has considered the number of people that would be affected by the measure at the heart of the legal advice and whether further weight should be given to the public interest factors that favour disclosure on that basis, as was the case in *'Mersey Travel'*. He notes that the legal advice legitimately concerns the individual, his family and other individuals who may undergo extradition in the future. However, the Commissioner notes that the number of individuals is not of the same magnitude as in *'Mersey Travel'* and has therefore decided that this factor does not add additional weight in this instance.

Balance of the public interest arguments

48. The Information Tribunal in *Calland v Information Commissioner and the Financial Service Authority* [EA/2007/1036] explained the Tribunal's approach when considering the balance of public interest in this exemption (at paragraph 37):

'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , 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.'

49. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. In *Dr Thornton v Information Commissioner* [EA/2009/0071] (paragraph 15), the Tribunal distilled the High Court's approach into six principles:
- there is a strong element of public interest inbuilt into the exemption;
 - there need to be equally strong countervailing factors for the public interest to favour disclosure;
 - these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
 - as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;

- there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
 - the most obvious cases where the public interest is likely to undermine legal professional privilege is where there is reason to believe that the public authority is misrepresenting the advice which it has received, in circumstances in which it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
50. In this case the Commissioner believes that the strong inbuilt public interest argument concerning the protection of the concept of legal professional privilege is important in this case. He notes when considering the fourth point that this legal advice was live at the time of the request and this intensifies the strength of protection that is to be expected. He has also been satisfied that the judicial scrutiny this advice has undergone and will undergo adds further weight to the strong inbuilt public interest argument. He believes that this case represents the circumstances that were envisaged to be covered by the exemption in section 42(1).
51. The Commissioner has had the opportunity of seeing the withheld information. In his view, it does not reveal any of the concerns potentially raised by the complainant, particularly that the public authority may have misrepresented 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 has obtained.
52. The Commissioner has considered the weight of the public interest factors in disclosure but is not convinced that they come close in this case to being equally strong countervailing factors that would override the public interest factors in maintaining the exemption on the circumstances of this case.
53. For all the reasons above, he is therefore satisfied that the public interest in maintaining the application of the exemption outweighs the public interest in disclosure.
54. He therefore determines that the exemption found in section 42(1) has been applied correctly and does not uphold the complaint.

Procedural Requirements

55. The public authority complied with the procedural requirements specified in the Act in this case.

The Decision

56. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

57. The Commissioner requires no steps to be taken.

Other matters

58. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. In the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed.
59. In this case the complainant's internal review request was made on 3 September 2009 and the public authority communicated its decision on 2 November 2009. The public authority therefore took 41 working days to complete the review. The Commissioner does not believe that any exceptional circumstances existed in this case to justify that delay, and he therefore wishes to register his view that the public authority fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

Right of Appeal

60. 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 16th day of December 2010

Signed

**Jon Manners
Group Manager**

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

Legal Annex

Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

Section 1 provides that:

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

Section 42 – 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.