

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 September 2010

Public Authority: Tate Modern
Address: Tate Gallery
Millbank
London
SW1P 4RG

Summary

On 23 December 2009 the complainant submitted a Freedom of Information request to the Tate Modern requesting a copy of the legal advice it had received about the potential legality of displaying a photograph of Brooke Shields in a Pop Life Exhibition at the gallery. Following the legal advice, the photograph was displayed. However, it was then withdrawn once the police had advised that the work was "indecent" under the Protection of Children Act 1978. In its response to the information request Tate argued that the legal advice was exempt under section 42(1) of the Freedom of Information Act 2000. The Commissioner considers that Tate was correct to apply section 42(1) and that the public interest favours maintaining 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.

The Request

2. On 23 December 2009 the complainant wrote to the Tate Modern ('Tate') and requested the following information:

"Please could you provide me with copies of all correspondence you

hold (both sent and received, email and letters) in relation to the Tate Modern seeking legal advice from lawyers about the potential legality or not of displaying the Brook Shields (sic) photograph in the gallery. This inquiry should be restricted to all correspondence with legal representatives, not police or members of the public or representatives of the pictures. It should also be restricted to those pieces of correspondence dated prior to the date the picture was withdrawn from the show."

3. Tate responded on 21 January 2010. It explained that the requested information was exempt under section 42(1) of the Freedom of Information Act 2000 (the Act) on the basis that it constituted legal advice and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
4. On 28 January 2010 the complainant requested an internal review.
5. This was provided on 22 February 2010. The decision to apply section 42(1) was upheld and in addition the public authority applied section 41 to the requested information.

The Investigation

Chronology

6. On 22 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled and to ask that Tate's public interest arguments should be reviewed.
7. On 7 May 2010 the Commissioner asked Tate to provide him with a copy of the withheld information. Tate was asked to provide further information regarding the exemptions it had applied and to add any public interest arguments it felt were relevant. It was also asked to provide any relevant press releases which had been issued.
8. These were provided to the Commissioner on 25 June 2010. Tate explained that it no longer wished to apply section 41 of the Act to this information. It explained that it considered that section 42(1) Legal Advice Privilege was engaged only in relation to certain parts of the legal advice given to the Board of Trustees of the Tate Gallery by its internal and external legal advisers. This concerned specific issues of the applicability of the Protection of Children Act 1978 to Tate and its senior staff. Tate explained that it considered section 42(1) did not apply to some parts of emails identified as relevant to the request, but

did apply to other parts. However Tate wished to apply section 40(2) to the disclosure of the names of two legal advisers who were identified in the legal advice documents.

9. On 28 June 2010 the Commissioner asked Tate to provide the complainant with the information that it did not consider to be exempt from disclosure.
10. On 28 June 2010 the complainant confirmed to the Commissioner that he was not interested in the names of the individual lawyers who were identified in the legal advice documents but believed that the name of the law firm should be disclosed.
11. On 29 June 2010 the Commissioner informed Tate of the above. The Commissioner explained that as the name of the law firm had not been redacted in the information that had been provided to him, it was assumed that this name would not be redacted from the information to be provided to the complainant. Tate confirmed that this was the case.
12. On 1 July 2010 the redacted information was provided to the complainant.
13. The complainant informed the Commissioner that he was not satisfied with the information provided to him.

Scope of the case

14. When the complainant contacted the Commissioner to make his initial complaint, he asked the Commissioner to consider the response of Tate and in particular to review Tate's public interest arguments.
15. During the course of the Commissioner's investigation Tate confirmed that it no longer wished to apply section 41 to this request. It clarified that it now considered it could disclose a copy of the Protection of Children Act 1978 which had previously been withheld.
16. During the course of the investigation the complainant confirmed that he was not interested in the names of the two legal advisers who were identified in the legal advice documents.
17. The Commissioner has therefore considered the application of section 42(1) to parts of the legal advice given to the Board of Trustees of the Tate Gallery by its internal and external legal advisers. This advice concerned specific issues of the applicability of the Protection of Children Act 1978 to Tate and its senior staff.

Analysis

Exemptions

Section 42

18. The full text of section 42 is available in the Legal Annex at the end of this Notice.

19. 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; 4 April 2006)* 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."

20. 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. 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.

21. For the avoidance of doubt, the Tribunal in the case of *Calland and the Financial Services Authority (EA/2007/013)* also confirmed that in-house legal advice or communications between in-house lawyers and external solicitors or barristers also attracts legal professional privilege.

22. In this case the legal advice was sought by the Director/Accounting Officer and the Chief Operating Officer of Tate on behalf of the Board of Trustees of the Tate Gallery. They sought advice from Tate's lawyers on a professional basis prior to the withdrawal of the Brooke Shields photograph from the Pop Life Exhibition on Wednesday 30 September 2009.

23. The advice was provided in three email documents: one dated 28 September 2009 and two dated 29 September 2009 (one at 18:01 and one at 18:10).
24. In the document dated 28 September 2009, it is clear that a solicitor employed by Tate (the client) sought legal advice from a solicitor at a firm of solicitors Withers LLP (the professional legal adviser) in connection with this policy. The Commissioner is satisfied that the redacted part of this email is confidential legal advice to a client which advises the client on a specific matter. The sole purpose of the communications was to provide legal advice.
25. In the two documents dated 29 September 2009, the acting Head of Legal at Tate (the professional legal adviser) provided specific legal advice to the Director / Accounting Officer at Tate (the client), further to their discussions with an instructed external counsel (a barrister). Certain parts of the email advice have been redacted under section 42(1) of the Act. The advice is confidential and the sole purpose of the communication was to provide legal advice.
26. The redacted legal advice contained in the three documents meets all three conditions: it is confidential; it is made between a client and professional legal adviser acting in their professional capacity; and it is made for the sole or dominant purpose of obtaining legal advice. The Commissioner is therefore satisfied that the redacted legal advice is subject to advice privilege.
27. This information has not been shared with any third party outside Tate and its professional advisers.
28. Tate's general press statements, made at the time the photograph of Brooke Shields was withdrawn from display, did not give any specific information about the legal advice received from Tate's lawyers. Tate has not waived privilege in those parts of the legal advice it seeks to redact.
29. Since section 42 is a qualified exemption it is subject to the public interest test under section (2)(2)(b) of the Act. 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 of the information". The Commissioner has therefore considered the public interest arguments in favour of maintaining the exemption and in favour of disclosing the information below.

Public interest arguments in favour of disclosing the requested information

30. The Commissioner considers that there is a public interest in Tate being accountable and transparent about the decisions it has made regarding the display of controversial photographs at the gallery. In this case disclosure would show Tate's considerations in making its decision within the context of the legal framework.
31. There is also a public interest in understanding how public money has been spent by Tate. It paid for and received legal advice, displayed the photograph and then withdrew the picture. The complainant has suggested that Tate's "confusion" over the photograph has therefore cost taxpayer's money and that the public should be informed about the quality and nature of that legal advice.
32. The display and withdrawal of the photograph at Tate has generated a wide coverage and discussion about art, indecency and censorship both in print and on the internet. For this reason there is a strong argument that it is in the public interest that Tate should disclose the withheld legal advice. This would inform the debate and promote an understanding of the legal context in which such art galleries operate.

Public interest arguments in favour of maintaining the exemption

33. Tate has argued 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 Tate needs to be able to take legal advice in confidential circumstances in order to inform its decisions. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future, the principle of confidentiality might be undermined and the legal advice less full and frank than it should be.
34. The above argument is supported by the comments made by the Tribunal in the *Bellamy* case in which it stated that disclosure was unlikely to be justified in most cases as:

'it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...'
35. In this particular case Tate has argued that there is a public interest in preserving its ability to seek and obtain full and frank advice regarding

the effective conduct of its business. Such advice needs to be given in context with a full appreciation of the facts and the legal advisers consulted must present a full picture of the given issues. Without such comprehensive legal advice the quality of Tate's decision making would be reduced because it would not be fully informed and this would be contrary to the public interest.

36. Tate has argued strongly that it is in the public interest that it should be able to receive and continue to rely on legal advice dealing with the legal strengths or weaknesses of its position, the applicability or not of any available defences and the possible reaction of a criminal jury, without the risks of disclosure. It would be strongly against the public interest to create a situation where Tate's ability to obtain proper legal advice was constrained by the potential disclosure of that advice.
37. Tate has also argued that the legal advice is very recent and is still being relied upon. It considers that any disclosure of information which is still relevant to certain issues would be unfairly prejudicial to Tate's decision making abilities.
38. The Commissioner is aware that the matter concerns potential liability under the criminal law not only for the organisation itself but also for individual trustees and officers of the Board. The advice therefore concerns potentially serious issues and relates to significant personal interests of individuals.

Balance of the public interest arguments

39. The Commissioner has considered whether the arguments in favour of disclosure are outweighed by those in favour of maintaining the exemption. In carrying out the balancing exercise he has borne in mind that there is an assumption in favour of disclosure in the Act.
40. The Commissioner considers that the complainant's points concerning the spending of public money lend some weight to the argument that disclosure of the information would result in greater accountability and transparency.
41. The Commissioner is aware that although Tate does receive public money, it is also reliant upon private donations. Whilst this point affects the assumption that the gallery should be transparent and accountable to the public regarding its finances, the Commissioner considers that there is still a strong argument that the gallery should be accountable as ultimately it is a public authority.

42. When considering the significance of the argument regarding transparency, the Commissioner has also noted the Information Tribunal's comments in the case of the *Foreign and Commonwealth Office v the Information Commissioner (EA/2007/0092)*. In that case the Tribunal stated that the public interest in favour of disclosure must be "more than curiosity as to what advice the public authority has received". The cases where transparency and accountability were significant factors must 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".
43. In this case, the Commissioner agrees with the complainant that the events following the legal advice are significant to this argument. Tate took advice, displayed the photograph and then withdrew it. It would therefore appear that Tate changed its mind about the position it wished to take once the Police advised that the work was "indecent" under the Protection of Children Act 1978. The nature of the legal advice it received is fundamental to the question of accountability. There is therefore a strong argument to support the view that Tate should explain its use of public money and explain the position that it took following its legal advice. It should be transparent about its decision making process. In view of this, the Commissioner has attributed some weight to this argument.
44. However, Tate has argued that it did give due consideration to the general public interest in the decision making processes concerned with this matter. During the period in question it made general statements via its press releases and no issues of misrepresentation or concealment of unlawful behaviour have arisen. Tate has argued that it sought to keep the public informed: its main press statement stated that the police considered that it had committed an offence under the Protection of Children Act 1978. Tate therefore believes it has been transparent in its approach.
45. Although the Commissioner has attributed some significance to the arguments in favour of releasing the withheld information he has also taken into account the comments of the Information Tribunal in the *Bellamy* case in which it stated that:
- 'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'.*
46. The Commissioner agrees with the Tribunal's comments and in this case has attributed considerable weight to the argument that there is a

public interest in preserving the concept of legal professional privilege. This preserves the ability of people and organisations to obtain full and frank legal advice.

47. There have been relatively few occasions in cases where legal professional privilege has been claimed when the Commissioner or Tribunal have considered that in all the circumstances, the public interest in disclosure was strong enough to outweigh the public interest in maintaining the exemption; however one such case was that of the *Mersey Tunnel Users Association v Information Commissioner and Merseytravel (EA/2007/0052)*.
48. In that case, the Information Tribunal outlined some of the factors which weighed in favour of disclosing the information. The Tribunal judged that the number of people affected in that case was significant as the advice affected 80,000 drivers every weekday and could also affect around 1.5 million residents. There was also a large amount of money at stake: around £70 million.
49. In this case there is no large amount of public money at stake and a large number of people are not affected. These are not significant factors to weigh in favour of disclosure in this case.
50. In the *Merseytravel* case, the Tribunal judged that the countervailing considerations in favour of disclosure were strong enough to override the strong public interest arguments in favour of maintaining the exemption. In giving less weight to the arguments inherent in the exemption the Tribunal noted that the advice received was not recent (it was over 10 years old).
51. However in this case the Commissioner notes that at the time of the request the advice was both recent and 'live'. The advice was 3 months old when the request was made. In this case, the advice concerned the potential liability under criminal law of both the organisation itself and the individual trustees and officers of the Board. The disclosure of the information could therefore prejudice any future criminal cases involving the Tate and its employees. This gives further weight to the argument that legal professional privilege should be protected in this instance.
52. In addition, in the Commissioner's view, the fact that the advice was recent means that should the information be released, it is more likely in the future that both lawyer and client would feel inhibited from providing the full circumstances of a case and from giving frank legal advice. He considers that the fact that the advice was recent adds

further weight to the arguments in favour of maintaining the exemption in this case.

53. The Commissioner acknowledges that in the *Merseytravel* case the Tribunal also afforded less weight to protecting legal professional privilege because the advice was concerned with matters of public administration rather than “significant private interests”. However in his view there is still a public interest in preserving the ability of public authorities to obtain legal advice in connection with their duties and responsibilities. He believes that support for this approach can be taken from the Tribunal’s findings in the case of *Fuller v the Ministry of Justice (EA/2008/005)* which stated that the principles behind legal professional privilege “are as weighty in the case of a public authority as for a private citizen seeking advice on his position at law...”
54. There is a particular public interest in ensuring that an art gallery can obtain full and informed legal advice so that it can make decisions that are compliant with its legal obligations. As an organisation, an art gallery may wish to push the boundaries of what is culturally acceptable. It is important that in this context it should be allowed to obtain full and frank legal advice in confidence to ensure that it makes informed decisions which are lawful.

Conclusion

55. In view of all the above the Commissioner is satisfied that in this case the arguments in favour of maintaining the exemption outweigh those in favour of disclosure. In reaching this conclusion the Commissioner has judged that the arguments in favour of disclosure are not strong enough to override the strong public interest arguments in favour of maintaining the exemption. Tate explained the reasons for its withdrawal of the photograph. The advice is recent and does not affect a significant number of people. There is no large amount of money involved. There is no suspicion of misrepresentation or unlawful behaviour. The Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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.

Right of Appeal

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.

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 30 day of September 2010

Signed

Andrew White
Group Manager, Complaints Resolution

Information Commissioner's Office
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Wilmslow
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SK9 5AF

Legal Annex

Section 42 (Legal Professional Privilege) provides that –

- (1) “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.
- (2) 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”