

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 February 2011

Public Authority: Intellectual Property Office (IPO)
Address: Concept House
Cardiff Road
Newport
South Wales
NP10 8QQ

Summary

The complainant requested six items of information that had been withheld previously in relation to a different request and considered by the Commissioner in FS50301299. This concerned the legal advice that was commissioned about how the public authority was to handle an earlier request. The public authority issued a response and explained that it believed that all the relevant recorded information was exempt by virtue of section 42 [legal professional privilege] and that the public interest in maintaining that exemption outweighed the public interest in disclosure. It did not offer an internal review given that the Commissioner had already considered the information previously.

The Commissioner has carefully considered this case. He has determined that the information was covered by legal professional advice privilege and he continues to believe that the public authority was correct that the public interest in maintaining that exemption did outweigh the public interest in disclosure in this case. He has therefore finds that section 42(1) has been applied correctly and upholds the public authority's position. He did find a procedural breach of section 17(1)(b), but requires no remedial steps to be taken in this case.

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 Commissioner acknowledges the complexity associated with the situation in this case. He believes it is necessary to provide some clarity. The withheld information in this case is the legal advice provided in the context of how the public authority planned to deal with a previous request for information from [Individual redacted]. The previous request was considered by the Commissioner in Decision Notice **FS50099396**¹. This Decision Notice was then appealed to the Information Tribunal who dismissed the appeal in **EA/2007/0075**². The Information Tribunal's decision was then appealed unsuccessfully to the High Court in **CO/6933/2008**³.
3. The Commissioner has previously considered two earlier cases that concern the same disputed information and this resulted in the Decision Notices **FS50300314**⁴ and **FS50301299**⁵. **FS50300314** related to a complaint made by [Individual redacted]. The Commissioner concluded that the information amounted to his own personal data and found that the public authority should have applied section 40(1) to it. **FS50301299** was a request received from a different complainant. The Commissioner considered the situation and found that the information was withheld correctly under section 42(1) [legal professional privilege].
4. The current complainant is unhappy with the Commissioner's decision with regard to section 42(1) in **FS50301299**. She explained that in her view the Commissioner placed insufficient weight on the public interest factors that favoured disclosure and that he should have ordered the disclosure of the information. She made a new request for information and provided her arguments about the further factors that she believes makes the balance of public interest favour disclosure.

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2007/FS_50099396.ashx

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i130/Szucs.pdf>

³ <http://www.informationtribunal.gov.uk/DBFiles/Appeal/i130/CO-6933-2008.pdf>

⁴ http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50300314.ashx

⁵ http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50301299.ashx

The Request

5. On 27 July 2010 the complainant wrote a detailed letter about other complaints that had been dealt with by the public authority and the Commissioner. She explained that she believed that there was a compelling public interest in transparency and asked for the six items considered in **FS50301299** that were quoted as [the Commissioner has added the numbers for convenience]:
 1. *"A copy of the legal advice itself dated 23 March 2005 ('item 1').*
 2. *An email requesting legal advice about making the response under the Act ('item 2').*
 3. *Covering email relating to the legal advice itself ('item 3').*
 4. *A second email requesting further advice ('item 4').*
 5. *An email providing further advice ('item 5').*
 6. *An email acknowledging and discussing the further advice ('item 6')."*
6. On 16 August 2010 the public authority issued its response. It explained that the situation had not changed from when the Commissioner decided **FS50301299**. It was continuing to rely on section 42⁶ to withhold the information. It said that the documents in question contain advice from or discussions with the Intellectual Property Office's legal advisers in connection with [Individual redacted]'s various complaints and related proceedings and appeals. It is exempt because the public authority believed it could maintain a claim of legal professional privilege in legal proceedings. It explained that in making this decision, it balanced any public interest in release of this information against the public interest in maintaining and applying legal professional privilege in this case. It explained that it was not prepared to offer an internal review in the circumstances of this case.

⁶ A full copy of all provisions cited in this Decision Notice can be found in its Legal Annex.

The Investigation

Scope of the case

7. On 16 September 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She provided the Commissioner with a transcript of the High Court case and asked the Commissioner to consider the following points:
- That the Commissioner should see this case as distinct from **FS50301299** as he was only considering the public interest arguments that had been presented by that complainant;
 - The public authority was also in error in failing to see this case as being distinct from **FS50301299**;
 - He should consider the public interest arguments that were submitted by [individual redacted] in **FS50300314**, which were rendered superfluous in that Decision Notice;
 - The arguments that were considered that maintained the exemption were generic and that the complainant did not believe that there was sufficient scrutiny of the background of [Individual redacted]'s long standing complaint;
 - The Commissioner did not consider the content of the High Court case, where it was clear that [Individual redacted] was open to Alternative Dispute Resolution and that the failure of the public authority to be open to it was an important factor that favoured disclosure;
 - That the public authority handled the request in **FS50099396** inconsistently and that this meant the position that may be contained within the legal advice would be likely to be unsustainable and therefore transparency was important;
 - That it was discretionary for the public authority to apply exemptions in respect to **FS50099396** and the complainant believed that its inflexible stance could not have been in accordance with the legal advice;
 - That the complainant believes that it was in the public interest to reveal the true nature of the enquiry that led to the application of section 32 in **FS50099396**;

- That it is in the public interest to know that the public authority acts with integrity, whether it investigates serious complaints and how it does so;
 - That the complainant believes that the public authority's investigative process in respect to allegations of deceptions by Patent Agent was defective and further transparency was required;
 - That the public authority has acted inappropriately in declining to investigate [Individual redacted]'s allegations;
 - That it is in the public interest that any public authority acknowledges their errors and rectifies them in the future;
 - That the complainant believes that [Individual redacted] has been misled by the public authority who presented the Commissioner's previous decisions as applying wider than they do.
 - That it was in the public interest for the public authority to use its resources reasonably and it was important that the information was disclosed to enable its justification for its conduct in the matters above to be open to scrutiny; and
 - The Commissioner should consider the effects of actual disclosure when considering the weight of the in built public interest in maintaining LPP.
8. For clarity, the Commissioner has not received any other arguments in **FS50300314** that were not already outlined in paragraph 7 above.
9. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. The Commissioner is not the body to consider how [Individual redacted]'s substantive complaint was dealt with by the public authority. The Commissioner is only able to consider the obligations that arise from the request dated 27 July 2010.
10. Therefore, the scope of the Commissioner's investigation is to consider the operation of section 42(1) to the six items that also formed the disputed information in **FS50301299** (outlined in the request for information in paragraph 5 above).

11. It is noted that all exemptions are applied discretionarily by public authorities. The Commissioner's role is to determine whether the public authority could apply the exemption that it has cited or not.

Chronology

12. On 3 November 2010 the Commissioner wrote to the complainant and the public authority to confirm that he had received an eligible complaint.
13. On 10 November 2010 the Commissioner telephoned the public authority. The public authority explained that it wished to rely on all of the arguments that it had submitted in **FS50300314** and **FS50301299** and also any development of those arguments that was included in those Decision Notices. He also wrote to the complainant to confirm the scope of his investigation.
14. The Commissioner has decided that he has sufficient evidence to determine this case on the basis of the evidence that he had already acquired.

Analysis

Exemption

Section 42(1)

15. The public authority has explained in its view all six items are covered by legal professional privilege and that they can apply section 42(1) to them all. It also explained that in its view the public interest in maintaining the exemption outweighed that in disclosing the material.
16. 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"

17. 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)

18. 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 to 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.'

(at Paragraph 54)

19. Section 42(1) is a qualified exemption. This means that there is a two step approach that needs to be taken. The Commissioner must first consider whether the exemption is engaged and then, where it is, he will go on to consider whether or not the balance of public interest favours the maintenance of the exemption.

(1) *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 is a variation from its position in its refusal notice. This privilege is attached to communications between a client and its 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:

1. It must be between a qualified lawyer in their professional capacity and a client.
 2. It must be created with the sole or dominant purpose of obtaining or providing legal advice.
 3. It must be confidential.
22. The first requirement is one of fact. In this case all six items of correspondence are between a lawyer acting in their professional capacity and a member of staff of the public authority (their client). This requirement is therefore satisfied.
23. The Commissioner is also satisfied that the fact the advice was in-house advice does not change the public authority's ability to claim that the information was privileged. This accords with the decision of 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 LPP. 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'* (at paragraph 35).
24. The second requirement is also one of fact. The Commissioner has examined the withheld information and is satisfied that in all six cases the sole purpose was obtaining or providing relevant legal advice. The requirement is therefore also satisfied.
25. The last requirement is an issue of law. The Commissioner considers that the six items can be deemed confidential. This is because the information is of substance, was imparted in circumstances that led to an expectation of confidence (it was formal legal advice between a lawyer and their client) and the disclosure of the information would have led to an erosion of this confidence which would have not have accorded with the expectations of the confider. This erosion of confidence would have caused damage to the confider as its position may be prejudiced through unexpected disclosure. The final requirement is therefore satisfied.

26. The Commissioner's view is also that public authority has not lost its confidentiality and therefore 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, such as the issuing of the response to [individual redacted], will not result in the loss of confidentiality and therefore the loss of legal advice privilege. His view has been confirmed by the Information Tribunal in *FCO v Information Commissioner (EA/2007/0092)*⁷ 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]

27. The Commissioner is satisfied that the information that has been provided to the public does not falsely represent the withheld information. He is also satisfied that on the facts of this case that there is no waiver, that the confidentiality of the advice remains and the exemption is engaged for all six items.
28. The complainant has confirmed that she admitted that the information contained paragraphs 20 to 27 (that echo the Decision Notice in **FS50301299**) were relevant to this case. The Commissioner will now move on to consider the public interest test.

(2) The 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 disclosed 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

⁷ This decision can be found at the following link:
http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf

relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption but can consider all public interest factors that relate to the disputed information when weighing the public interest factors that favour disclosure.

30. It is important to note from the outset 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 some members of the public (such as the complainant and [individual redacted]) may be interested in the information, 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 public⁸.

Public interest arguments in favour of maintaining the exemption

31. In arguing that the public interest favoured withholding this information, the public authority has reiterated 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 public authority 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. As a consequence legal advice may well set out the perceived weaknesses of the public authority's position. Without such comprehensive advice, the public authority's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest. The complainant has argued that the exposure of potential weaknesses in its position should amount to a compelling public interest in disclosure. The Commissioner is of the view that there is a legitimate public interest in legal advice being complete.

⁸ *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

33. Disclosure of legal advice has a significant prejudice to the public authority'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. It is also possible that there may even be a reluctance to seek legal advice. This could lead to decisions being taken that are legally unsound. Not only would this undermine the public authority's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided. The Commissioner acknowledges that there is a public interest in the proper administration of justice and the concept of legal professional privilege plays an important role in maintaining this. For example the Commissioner has considered Lord Taylor of Gosforth CJ's obiter 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'.*
35. 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 public authority is able to consider the wider picture and potentially rely on its advice in the future (both in this case and others). This is particularly so given that [Individual redacted] continues to further his central complaint through any available means. This is a further public interest in maintaining the exemption.
36. Further in this case the position of the public authority has experienced considerable scrutiny in respect to its position in this matter. The Information Commissioner considered [Individual redacted]'s original case (**FS50099396**) and both the Information Tribunal and the High Court upheld this Decision Notice. In addition, exactly the same disputed information withheld under the same exemption had been considered by the Commissioner in **FS50301299**. The public authority believes that the fact that its position in respect to information access matters (which the disputed information concerns) had been tested in

such forums enhances the weight that can be put on the public interest in maintaining the legal professional privilege concept on the circumstances of this case.

37. The complainant has argued that the public authority's conduct in making the potential of Alternative Dispute Resolution not possible in the High Court case meant that the scrutiny of its position was not complete. The Commissioner notes that the High Court case concerned the Information Tribunal's case about whether the disputed information in **FS50099396** was withheld correctly under section 32 of the Act. As the only possibility that would address this issue was the disclosure of the information then the Commissioner is satisfied that the public authority acted appropriately in the High Court case and that the transcript and judgment support that this is so.
38. The complainant has argued in the alternative that the High Court and Information Tribunal were limited to considering the application of section 32 and that there was no scrutiny in respect to the [Individual redacted]'s overall complaint or the merits of disclosure of the disputed information in **FS50099396**. The Commissioner notes that the withheld information concerns the public authority's position in **FS50099396** in respect to the information withheld in that case. The Information Tribunal found that the exemption was applied correctly and the central complaint is not a relevant consideration in that case. The issue was whether the exemption applied or not. Similarly in this case, the question is whether the exemption found in section 42(1) can be applied to the specific information requested. The Commissioner is not the forum to consider other complaints about the public authority's previous decisions. He therefore finds that the complainant's arguments in this matter are unconvincing.
39. The complainant has also argued that the Commissioner has not placed enough reliance on the fact that [Individual redacted] required the contents of the disputed information to further his complaint. She has argued that the legal advice could not have been to withhold the information in **FS50099396** as this inflexibility has led to consequential appeals that were unnecessary. The Commissioner is unable to divulge the contents of the disputed information as to do so would defeat the purpose of his investigation. However, he notes that the position of the public authority was upheld in **FS50099396** by two bodies. Given that the position of the public authority in **FS50099396** was determined to be correct, then it was entitled to withhold that information. The consequential appeals only resulted because [Individual redacted] disputed that this was so and the right to make those appeals is provided in law. It cannot be said that the withholding of the disputed information has led to unnecessary consequential

appeals for they were not of the public authority's making given that its position was upheld throughout and it was up to the complainant whether or not to challenge its position.

40. The Commissioner, having considered the complainant's arguments to the contrary, believes that the public interest in maintaining the legal professional privilege concept is strengthened by the fact that the information that is the subject of the (withheld) legal advice was itself subject to an Information Tribunal decision and a High Court decision, where the information was deemed to be correctly withheld. He has also reconsidered the withheld information in light of the complainant's new arguments and is satisfied that they do not change this view.
41. The public authority 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 only be in 'exceptional circumstances' that this will be outweighed by the public interest in disclosure. It explained that it regarded the advice as being live at the date of the request because [individual redacted]'s complaint is a long running one.
42. While the Commissioner does not accept 'exceptional circumstances' are required, he does acknowledge the strength of the arguments advanced by the public authority. Indeed, there is a significant body of case law to support the view that there is a strong element of 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.' (at paragraph 35)
43. The Commissioner has considered the complainant's contention that he should be required to consider the effects of the actual disclosure of the six items withheld. Indeed the Commissioner accepts that every case is to be considered on a case by case basis. However, the Commissioner believes that it is wrong to consider the release of the information outside its context. The context is that the information is that it is privileged and there would be detriment to that concept should the information be disclosed.

Public interest arguments in favour of disclosing the requested information

44. 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(1) of the Act to be used absolutely. Indeed the Tribunal's decision in the case of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* [EA/2007/0052] ('Mersey Travel') underlines this point. In this 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 which affected a substantial number of people.
45. 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 public authority's decision not to provide the information to [individual redacted]. Disclosure of the legal advice may assist the public's understanding of why the public authority has made the decision it has. The complainant has argued that the weight of this public interest should be enhanced by the public authority's alleged inconsistency in its handling of **FS50099396**, because it may be constructive to understand the public authority's position in respect to [Individual redacted]'s overall complaint and to ensure that the public authority acts with integrity. The Commissioner accepts that disclosure would provide some information about how the public authority handled an information request in this context. However, he believes that there is nothing within the withheld information that has cast doubt on the public authority's integrity in respect to the handling of the information request to which it related.
46. The Commissioner also accepts that 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 public authority's position.
47. The Commissioner also notes that the advice was generated through the expenditure of public money and this adds weight to the arguments of transparency. He also agrees with the complainant that it is in the public interest for the public authority to be able to use its resources efficiently. However, the Commissioner does not agree that the disclosure of the advice is required to enable its justification for how it handled the request considered in **FS50099396** to be open to scrutiny. As noted above, the arguments have been scrutinised by the

Commissioner and the Information Tribunal. Indeed Parliament provided the Commissioner and the Information Tribunal with the duty to investigate compliance with the Act and to consider all the arguments from both sides. The Commissioner believes that it was prudent for the public authority to take legal advice on 23 March 2005. The Act was at that time new legislation imposing new obligations and it was known that [Individual redacted] would be highly likely to approach the Commissioner given his previous interaction with the public authority through his series of ongoing complaints.

48. 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 [Individual redacted], his family and other individuals who may have concerns about how the public authority operates. However, the number of individuals is not of the same magnitude as in *'Mersey Travel'* and therefore this factor does not add additional weight in this instance.
49. Finally, the Commissioner has considered the complainant's other arguments about the public interest in disclosure being enhanced by her perception that it has failed to conduct its duties properly in respect to [Individual redacted]'s overall complaint. These can be summarised as:
 1. The public interest in understanding whether the public authority investigates serious complaints and how it does so;
 2. The contention that the public authorities investigative process in respect to allegations of deceptions by Patent Agent was defective and further transparency was required;
 3. That the public authority has acted inappropriately in declining to investigate [Individual redacted]'s allegations; and
 4. That it is in the public interest that any public authority acknowledges their errors and rectifies them in the future.
50. The Commissioner believes that none of the above arguments concern the information that has been withheld in this case. The information constitutes legal advice about how to handle the request that was considered in **FS50099396**. In the Commissioner's view the information access matters are distinct from the overall complaint because the obligations that are imposed on public authorities apply irrespective of who the complainant is and concern the nature of the

information that is being withheld. Indeed, all information disclosed under the Act should be disclosed to the public at large. The central complaint is irrelevant to this matter and the complainant's perception of other processes is irrelevant to the Commissioner's investigation about whether or not the legal advice should be disclosed to the public.

51. Finally, the Commissioner has considered the argument of the complainant that relates to the public authority's alleged reliance on the Information Commissioner's Decision Notice and Information Tribunal decision to uphold its position in respect to [Individual redacted]'s overall complaint. The Commissioner has not been provided with any evidence that this is so. However, he wants to state for the record that his Decision Notices concern only information access matters in respect to specific requests for information and nothing else. He does not believe that this alleged inappropriate reliance on Decision Notices amounts to a public interest factor that favours disclosure. In the Commissioner's opinion it is irrelevant to his consideration of this case.

Balance of the public interest arguments

52. The Information Tribunal in *Calland v Information Commissioner and the Financial Service Authority* (EA/2007/1036)⁹ explained the Tribunal's approach when considering the balance of the 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.'

53. 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)¹⁰, the Tribunal usefully distilled the High Court's approach into six principles:

1. there is a strong element of public interest inbuilt into the exemption;

⁹This decision can be found at:

http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf

¹⁰ At paragraph 15.

2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
 3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
 4. 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;
 5. 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
 6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
54. 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. 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 scrutiny the original decision has undergone gives 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).
55. The Commissioner has had the opportunity of seeing the withheld information. Clearly he cannot reveal its contents. In his view, however, it does not raise concerns 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.
56. 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. He has considered all the additional arguments that have been provided by the complainant and still

believes that their weight does not come close to that in maintaining the exemption.

57. 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. He therefore determines that the exemption found in section 42(1) has been applied correctly and does not uphold the complaint.

Procedural Requirements

Section 17(1)(b)

58. Section 17(1)(b) provides that a refusal notice should specify the exemption that is relied on. In this case the public authority failed to specify the subsection that was being relied upon when applying section 42(1) and the Commissioner believes that this constitutes a breach of section 17(1)(b).

The Decision

59. 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:
- It was entitled to rely on section 42(1) to withhold the relevant recorded information for this case.
60. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- It breached section 17(1)(b) because it failed to cite the exemption it relied on down to its subsection.

Steps Required

61. The Commissioner requires no steps to be taken.

Right of Appeal

62. 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 February 2011

Signed

**Andrew White
Group Manager: Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1(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 17 - Refusal of request

Section 17 provides that:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an

estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

Section 42 – Legal professional privilege

Section 42 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.

Section 51– Information Notices

Section 51 provides that:

(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve the authority with a notice (in this Act referred to as “an information notice”) requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

(2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received an application under section 50, or

(b) in a case falling within subsection (1)(b), a statement—

(i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection (1)(b), and

(ii) of his reasons for regarding that information as relevant for that purpose.

(3) An information notice must also contain particulars of the right of appeal conferred by section 57.

(4) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(6) In subsection (5) references to the client of a professional legal adviser include references to any person representing such a client.

(7) The Commissioner may cancel an information notice by written notice to the authority on which it was served.

(8) In this section "information" includes unrecorded information.