

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 25 August 2011**

**Public Authority: Department for Work and Pensions**  
**Address: 2nd Floor, The Adelphi**  
**1-11 John Adam Street**  
**London**  
**WC2N 6HT**

#### **Summary**

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The complainant requested the settled legal advice regarding the Health and Safety (Offences) Bill 2008 from the Department for Work and Pensions (the "DWP"). The complainant also asked the DWP to provide the other opinions, information or documents referred to at paragraph 16 of an Information Tribunal Decision EA/2010/0044. Additionally he requested all available information relating to research carried out, commissioned, or received by the Government as to the anticipated factual impact of the proposed measure. The requested information was refused by the DWP on the grounds of the exemption provided by section 42(1) of the Freedom of Information Act (the "Act"), relating to legal professional privilege. The Commissioner's decision is that the withheld information attracts legal professional privilege and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

#### **Background**

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2. Section 40 of the Health and Safety at Work Act 1974 (the "HSWA") reverses the normal burden of proof in an alleged breach of that Act. The legality of section 40 of the HSWA was tested in the Court of

- Appeal which ruled that it did not breach Article 6 of the European Convention of Human Rights (the "ECHR") which enshrined the right to a fair trial and the presumption of innocence. Part of this ruling involved the regulatory nature of the HSWA and the fact that offences were not "truly criminal"<sup>1</sup> and did not usually attract a custodial sentence. In 2008 a Bill to amend the Health and Safety at Work Act was introduced and enacted as the Health and Safety (Offences) Act 2008. It came into force on 16 January 2009. The Act increased the number of circumstances in which individual defendants could be imprisoned for health and safety breaches and thus potentially breach the ECHR.
3. The complainant had previously requested the legal advice given to the DWP in support of the Health and Safety (Offences) Bill. The background to this request related to a proposed legislative change which sought to impose a term of imprisonment for certain offences. The statutory defence for these offences has a reverse burden of proof. The request focused on whether the introduction of imprisonment for these offences would entail a breach of article 6 of the ECHR. Paragraph 21 of the Explanatory Notes to the Bill stated that it was the DWP's view that the proposed change was compliant with existing human rights' law.
  4. A similar request for information had been refused by the DWP on the grounds of the exemption provided by section 42(1) of the Act. The Commissioner had upheld the DWP's position in FS50237293. The complainant appealed this decision at the Information Tribunal which upheld the decision of the Commissioner and dismissed the appeal. However, the Tribunal cast doubt that the 'live' nature of the disputed information could still be maintained after the point at which it made its decision.

## The Request

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5. On 8 September 2010, the complainant made the following request to the DWP:
  - '1. I regret that what you have said is not an acceptable answer.*
  - 2. I have been trying to get at the substance of the Ministers(sic) opinion without having to force disclosure of the actual Memorandum but as you are intent on frustrating my right to this*

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<sup>1</sup> In R v Davies [2002] EWCA Crim 2949

*information I will have to redraft a further request specifically for the Memorandum.*

- 3. As you will know (sic) choose to ignore the Tribunal only found against my original request because of the "live issue" part of the test, which applied at the time of that request, but the Tribunal has specifically said would not apply to a fresh request. See paragraph 36.*
- 4. Please accept this message as a request under the FOIA for the information referred to in the Decision of the Tribunal (EA/2010/0044) at Paragraph 2 as "The DWP identified one discussion which it said represented the settled legal advice giving rise to the Ministers (sic) opinion "...and later referred to at Paragraph 6 as the "disputed information". Please provide that document.*
- 5. Further please also provide the other opinions, information or documents referred to at paragraph 16 of the Tribunals Decision.*
- 6. Further please provide all available information relating to all research carried out by, or commissioned by, or received by, the Government as to the anticipated factual impact of the proposed measure and its claimed, necessity and deterrent effect in relation to safety offence.'*
6. On 6 October 2010, the DWP provided information relating to point 6 of his request in relation to the complainant's request for "*all research carried out by the Government*". The DWP informed the complainant that they had been unable to identify any specific research but gave him links to related research. The DWP added that it needed more time to consider the remainder of his request because the information sought engaged a qualified exemption.
7. On 3 November 2010, the DWP responded by issuing a refusal notice citing section 42(1) – legal professional privilege - as the reason for withholding the requested information. The DWP also found that the public interest in maintaining the exemption outweighed the public interest in disclosing it.
8. The complainant asked for an internal review of this decision on 4 November 2010.
9. The DWP responded by writing to the complainant on 1 December 2010 to explain that it needed more time to consider the review because the information sought engaged a qualified exemption.

10. On 4 January 2011, the DWP's internal review upheld the decision to withhold the requested information under section 42(1). It provided its arguments that the public interest in maintaining the exemption outweighed the public interest in disclosing it.

## The Investigation

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### Scope of the case

11. On 4 February 2011, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - that the Tribunal in considering the complainant's previous substantially similar request had said that the "live" nature of the information was unlikely to be persuasive if a request was to be made again for the requested information. The complainant said that the balance of the public interest test now lay in favour of disclosure or was at least equal to arguments in favour of maintaining the exemption;
  - that the requested information was not legally privileged once it had been adopted by the Minister.

### Chronology

12. On 5 March 2011, the Commissioner wrote to the DWP asking that the withheld information be sent to him and requesting further argument concerning the application of any exemptions.
13. The Commissioner wrote again on 9 June 2011 asking the DWP to send the withheld information and to ask for further argument in determining the applicability of section 42(1) to the requested information.
14. The DWP responded to the Commissioner on 6 July 2011. The DWP sent the withheld information and provided its arguments for the application of section 42(1) to the remaining requested information. It was confirmed that the DWP considered the withheld information to be subject to legal advice privilege. It provided its public interest arguments, deciding that the public interest in maintaining the exemption outweighed the public interest in disclosing it.

## Analysis

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### Exemptions

#### Section 42 – legal professional privilege

15. The full text of section 42 is contained in the legal annex at the end of this decision notice.
16. 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*) 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.”* (para. 9)
17. The DWP confirmed in its letter of 6 July 2011 that it considered that the withheld information is subject to legal advice privilege. However the DWP made the point that this did not mean that future litigation was not being contemplated. Despite this proviso, it was accepted that just because there is a possibility that sooner or later someone may bring a challenge does not suffice to make litigation privilege applicable.
18. 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.
19. On 6 July 2011, the DWP confirmed that the sole or dominant purpose of the communications was to provide the client with legal advice and that the information was communicated in the legal advisers' professional capacity.
20. The DWP also confirmed in the same letter to the Commissioner that the requested information had not been made available to the public or to any third party without restriction; that it remained confidential and

that privilege had not been waived. None of the information the complainant sought has been disclosed other than the following:

- The Explanatory Note which disclosed the conclusion that had been reached in the 2007 Memorandum.
- A detailed statement summarising the 2007 Memorandum which was issued by the DWP in response to the complainant's submission of a further FOI request on 20 July 2010, seeking "*a detailed written statement of the reasons why the DWP Ministers considered that The Health and Safety (Offences Act) (when it was introduced as a Bill) was compliant with the ECHR*".

For the reasons given in paragraphs 16-19 the Commissioner therefore finds that the exemption is engaged.

21. As 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 below the public interest arguments in favour of maintaining the exemption and those in favour of disclosing the information.

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

22. A number of differently constituted Tribunals have indicated that weight must be attached to a general principle of accountability and transparency - "*...the public interest factors in favour of disclosure...can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process*"<sup>2</sup> (para 53 )
23. The DWP acknowledged on 6 July 2011 that the generic public interest in accountability and transparency favours disclosure in order that it can be seen that decisions have been made on the basis of good quality legal advice.
24. In the case of the *Foreign and Commonwealth Office v IC* (EA/2007/0092) the Tribunal considered what sort of public interest is likely to undermine the maintenance of legal professional privilege:

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<sup>2</sup> EA/2007/0055

*There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would 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 which it obtained."* (para. 29)

25. The DWP also put forward an argument in favour of disclosure that there is a public interest, in some cases, in knowing whether or not legal advice has been followed. However, the DWP stressed that the complainant had not alleged that the DWP did not follow the legal advice given and that the Tribunal had also stressed that its opinion was that the Explanatory Notes had not "*misrepresented*" the legal opinion or "*mised*"<sup>3</sup> the public with regard to the complainant's earlier request for information.

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

26. The rationale behind the concept of legal professional privilege is to ensure frankness between lawyer and client. One of the principles behind the maintenance of this exemption is that it serves the wider administration of justice. The DWP suggested in its letter of 6 July 2011 that the release of legally privileged information might lead to lawyers and clients avoiding making a permanent record of the advice, or making only a partial record. There may even be a reluctance to seek that advice at all.
27. The DWP also argued that the requested information was 'live'; did not affect a significant amount of people; and that there was no indication that the DWP was misrepresenting the advice given. In summary, the DWP asserted that there were not equally strong or countervailing factors in favour of disclosing the information.
28. Advice is 'live' if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted based on that advice.
29. The DWP argued that a legal issue does not cease to be 'live' on the passage of a Bill. It maintained that it remained so until such time as

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<sup>3</sup> Found at para. 31

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i417/Fisher\\_v\\_IC\\_&\\_DWP\\_\(EA-2010-0044\)\\_Decision\\_29-07-10\\_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i417/Fisher_v_IC_&_DWP_(EA-2010-0044)_Decision_29-07-10_(w).pdf)

the question is settled, for example by the courts in the course of a legal challenge. The DWP said that there had been no challenge to the reverse burden of proof in section 40 of the Health and Safety at Work Act 1974 in light of the recent raising of the maximum available penalties but that such a challenge remained a real possibility. In this event disclosure of the Government's legal advice could be prejudicial.

### Balance of the public interest arguments

30. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind Legal Professional Privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court case of *DBERR v Dermod O'Brien* who said:

*".....Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41).... The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (para 53).*

31. However, Justice Williams indicated that this did not mean that section 42 should be elevated "*by the back door*" to be an absolute exemption and instead indicated that the proper approach to take was to:

*"...acknowledge and give effect to the significant weight to be afforded to the exemption in any event, ascertain whether there were particular or further factors which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least..." (para 53).*

32. 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)<sup>4</sup>, 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;

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<sup>4</sup> 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."*
33. The complainant's argument amounts to a wish to examine and, possibly, criticise or challenge the advice given. It has not been suggested that the DWP is misrepresenting or ignoring the advice it has received. Even accepting the benefits of public scrutiny of such decisions, the Commissioner does not accept that the complainant's arguments at paragraph 10 amount to the sort of strong public-interest arguments intended by the Tribunal in *Foreign and Commonwealth Office* which also commented, at paragraph 30:
- "The interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go. Disclosure of privileged opinions is not a substitute for legal aid."*
34. Although the public interest in accountability and transparency weighs in favour of disclosure, it is already in the public domain that the DWP obtained and followed legal advice regarding the compatibility of the Health and Safety (Offences) Bill with the ECHR. The Commissioner has seen the withheld information. In his view, it does not raise concerns that the advice may have been misrepresented or that the DWP is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice. The Commissioner agrees that the better understanding by the public of the legal issues does not significantly increase the public interest in favour of disclosure in this instance.

35. The Commissioner acknowledges the Information Tribunal's doubt that the 'live' nature of the previously requested information could still be maintained after it had made its decision. However, he considers that the DWP's arguments in paragraph 27 are sufficiently compelling to accept that the withheld information is still 'live' in this particular case and that disclosure has the potential to be prejudicial in the event of a legal challenge. He has therefore given some weight to this factor and concluded that the continuing 'live' nature of the legal advice strengthens the public interest in maintaining the exemption.
36. For the reasons given above, the Commissioner is therefore satisfied that the public interest in maintaining the application of the exemption outweighs the public interest in disclosure. He has therefore determined that the exemption found in section 42(1) has been applied correctly and does not uphold the complaint.

## **The Decision**

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

## **Steps Required**

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38. The Commissioner requires no steps to be taken.

## Right of Appeal

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39. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

40. 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.
41. 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 25<sup>th</sup> day of August 2011**

**Signed .....**

**Pamela Clements  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### 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.'*

**Section 42(2)** provides that –

*'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.'*