

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2011

Public Authority: The Charity Commission
Address: PO Box 1227
Liverpool
L69 3UG

Decision (including any steps ordered)

1. The complainant has requested the legal opinion provided to the Charity Commission by the Tate Gallery's counsel about insurance monies relating to two stolen Turner paintings. The Charity Commission refused this request on the basis that the information was provided to them in confidence (section 41 of the FOIA). The Charity Commission then later also applied the legal professional privilege exemption (section 42) to withhold the information.
2. The Information Commissioner's decision is that the Charity Commission has correctly applied the legal professional privilege exemption to withhold the requested information.

Background

3. In 1994 two Turner paintings, on loan from the Tate Gallery (the 'Tate'), were stolen. In 1995 the Tate received the insurance money for these paintings (£24 million) at which point legal ownership of the paintings passed to the insurers. In 1998 the Tate repurchased the legal title to the paintings from the insurers for £8 million and in 2002 announced both paintings had been recovered.
4. The Tate made an application to the Charity Commission to establish a scheme for the administration of the insurance proceeds remaining following the recovery of the paintings. The request relates to a legal opinion provided to the Charity Commission by the Tate's counsel.

Request and response

5. On 16 April 2005, the complainant wrote to the Charity Commission for information relating to the Tate's request to the Charity Commission for a 'sanction' as to how to apply insurance money the Tate had received following the theft of two Turner paintings in 1994. The complainant requested the following information:

*"1. Details of the various rulings which have been made by the Commission regarding this matter from 1994 to date.
2. The grounds that the Commission has for those rulings.
3. Any submissions which the Commission has received concerning the status in law of the Turner bequest."*

6. The Charity Commission responded on 17 June 2005 providing information in relation to part (1) of the request and an explanation in regards to part (2) of the request. With regards to part (3) of the request the Charity Commission confirmed that information was held and submissions had been received from several different parties which the Charity Commission disclosed or withheld as set out below:

- Submissions from the complainant and the Turner Society – copies provided
- Submissions from the Tate – withheld as disclosure would prejudice the effective conduct of public affairs and inhibit free and frank discussions.
- Discussions with the Attorney General – withheld as information provided to the Charity Commission in confidence and the information attracts legal professional privilege.
- Correspondence with other government departments – withheld as information provided in confidence and disclosure would prejudice the effective conduct of public affairs and inhibit free and frank discussions.

7. A request for an internal review was made several years later on 14 March 2011. In this request for a review the complainant made specific reference to being dissatisfied with the Charity Commission's decision to withhold information relating to the Tate's use of the insurance money it received from the two stolen Turner paintings.

8. The Charity Commission conducted an internal review and wrote to the complainant on 24 May 2011 with the outcome of this review. The Charity Commission stated that they had already provided a legal analysis in its initial response in 2005 but were aware that the

complainant was specifically seeking the Tate counsel's legal opinion provided to the Charity Commission which was being withheld as the information was provided in confidence.

Scope of the case

9. The complainant contacted the Information Commissioner ("the Commissioner") to complain about the way his request for information had been handled. In particular the complainant expressed his view that the submissions provided by the Tate's legal counsel must have had some bearing on the decision made by the Charity Commission and should therefore be released.
10. The Commissioner has determined that whilst the initial request was much broader than just the Tate counsel's legal opinion, when the request was reconsidered in May 2011 both the complainant and the Charity Commission were considering whether this specific legal opinion could be disclosed. During the course of his investigation the Commissioner has confirmed that the Tate counsel's legal opinion is the outstanding information which the complainant is seeking and his investigation has therefore focused on the decision of the Charity Commission to withhold this as information subject to legal professional privilege.
11. The Commissioner has carefully considered the argument put forward by the Charity Commission that the Tate counsel opinion does not fall within the scope of the original request as the decision of the Charity Commission was not based on this opinion. The Commissioner established that the Charity Commission did not ask for the provision of this opinion, it was volunteered to the Charity Commission by the Tate and whether the opinion formed the basis of the Charity Commission's decision is not relevant. The Commissioner considers that as long as the opinion was considered, even if it was not used as the basis for any decision, it is within the scope of the original request.
12. Once it had been determined that the legal opinion was within the scope of the request, the Charity Commission also applied the legal professional privilege exemption to withhold the information. The Commissioner has accepted the application of this exemption and the scope of the case is therefore the application of the legal professional privilege exemption as well as the information provided in confidence exemption.

Reasons for decision

13. The Commissioner has initially focussed his investigation on the application of section 42(1) to the request which states 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”.*
14. The Commissioner has first assessed whether the withheld information is subject to legal professional privilege. Legal professional privilege was defined by the Tribunal¹ as *“... a set of rules or principles which are designed to protect the confidentiality 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.”*
15. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
16. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. This is because it is a legal opinion provided to the Tate by a professional legal adviser on the issue of the use of the insurance money from the stolen Turner paintings. Whilst the Commissioner notes that this is legal advice provided to the Tate and not directly to the Charity Commission, the Commissioner has previously² found that the legal professional privilege exemption can apply even where the advice is not advice generated by the public authority who receives the request.
17. The Commissioner considers that the requested information is subject to legal advice privilege and also notes that the Tate would still consider this advice to guide its thinking should a similar situation arise in the

¹ *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*

² *ICO decision notice FS50269559*

future. The Commissioner consequently finds that the legal professional privilege exemption is engaged.

18. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

19. The central public interest arguments in favour of the information being disclosed revolve around creating greater transparency around how insurance money has been spent by the Tate. The complainant has argued that Turner's bequest was to the National Gallery for the nation so any decision made allowing the Tate to spend insurance monies should have been conducted in a transparent manner to ensure the public would benefit from any profits made from the recovered Turner paintings.
20. When considering the public interest the Commissioner has taken into account the fact that a considerable sum of money is involved and the public interest in knowing how the Tate spent this money. However, the withheld information does not specifically set out how the money will be spent but offers a legal opinion on the general purposes the money could be used for.

Public interest arguments in favour of maintaining the exemption

21. There is a strong element of public interest inbuilt in this exemption, the central public interest arguments in favour of maintaining the exemption are those inherent in the concept of legal professional privilege. There is clearly a very strong public interest and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the provision of advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or ability to make fully informed and robust legal decisions.
22. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process, particularly where this process results in decisions on how large sums of money can be used.

23. However, it is the Commissioner's view that there are stronger public interest arguments in favour of maintaining the exemption. The Charity Commission argues that it is vital that the Tate should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues before decisions are made.
24. Although the information has been requested from the Charity Commission and not the Tate directly, the Commissioner is of the view that the privilege attached to the withheld information has not diminished by being provided to a third party, especially given the specific circumstances of this case. The Charity Commission has also taken steps to confirm with the Tate that any privilege has not been waived. Although the advice dates back several years, as the Tate states the advice is still live and would still be relied upon should it find itself to be in a similar situation in the future, the Commissioner considers the privilege attached to the information was not waived when it was passed to the Charity Commission and is still relevant now.
25. The Commissioner accepts that ordering disclosure of the requested information could inhibit the ability of the Tate, and to a lesser extent the Charity Commission, to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure. The Commissioner is also mindful of the Tribunal's comments in the *Bellamy* case that *"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest"*.

Balance of the public interest arguments

26. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in maintaining the exemption and withholding the information which is subject to legal professional privilege in this case. The Commissioner places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis in this case. He therefore concludes that the Charity Commission correctly withheld the requested information under the exemption as section 42 and has not gone on to consider the application of the section 41 exemption in this case.

Right of appeal

27. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

28. 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.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

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