

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2012

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant requested correspondence held by the Department for Communities and Local Government ("the DCLG") relating to ownership of the CON29 enquiries form, and information about the formation of a working group to review the questions on the current version of the form.
2. The DCLG responded that it did not hold any information on the latter point and refused to disclose information about the CON29 form, citing the exemption at section 42(1). During the Information Commissioner's investigation it substituted section 41(1) for section 42(1) in respect of some of that information.
3. The Information Commissioner's decision is that the DCLG withheld some of the information correctly under the exemptions at section 41(1) and 42(1). However, some of the information was not covered by the exemption at section 41(1).
4. The DCLG also breached section 17(1) of the Act by introducing an exemption during the investigation which it had not specified on a refusal notice or during the internal review.
5. The Information Commissioner accepts that the DCLG did not hold any information in respect of the second part of the request. However, by failing to confirm to the complainant that it did not hold the information within the statutory time for compliance it breached section 10(1).

6. The Information Commissioner requires the DCLG to take the following steps to ensure compliance with the legislation.
 - Disclose the information which is not covered by section 41(1) (bundles 3, 4 and 10) to the complainant.
7. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Information Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

8. On 3 June 2011, the complainant wrote to the DCLG and requested information in the following terms:

“Under the freedom of information act please supply the following.

Copies of any correspondence relating to the ownership of the Local enquiries search questions formerly known as the CON29 enquiries form and formerly owned by the Law Society.

Copies of any documentation relating to the formation of any working group to review the current 2007 version questions.”

9. The DCLG responded on 1 July 2011. It confirmed that it held information covered by the request, but stated that it was exempt under section 43 (commercial interests). It extended the time for response to 15 July 2011, so that it could consider whether disclosure was nevertheless in the public interest.
10. The DCLG wrote again to the complainant on 15 July 2011. It changed the exemption claimed to section 42(1) (legal professional privilege) and argued that the public interest favoured maintaining the exemption.
11. Following an internal review the DCLG wrote to the complainant on 16 August 2011. It upheld its decision in respect of the first part of the request. It amended its response in respect of the second part, stating that no information was held.

Scope of the case

12. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He cited the age of the information and the fact that there was no ongoing legal action as reasons for challenging the DCLG's decision not to disclose the information it held.
13. The DCLG initially advised the complainant that the information was exempt under section 43. However it subsequently amended this to section 42(1) and, later, added section 41(1). The Information Commissioner has therefore not considered the exemption at section 43 in relation to the request. He does, however, note that the DCLG relied upon an exemption (section 41(1)) which it failed to cite in its refusal notice or at the internal review.

Reasons for decision

14. The Information Commissioner has considered the DCLG's response to each part of the request separately.

Correspondence relating to the ownership of the local enquiries search questions (formerly known as the CON29 enquiries form)

15. The DCLG holds the following information which it judges to be covered by this part of the request:

Bundle	Content	Exemption
1	Legal advice	s.42
2	Submission requesting legal advice	s.41 s.42
3	2006 copyright agreement and appendix (DCLG signed)	s.41
4	2006 copyright agreement and appendix (Law Society signed) and correspondence	s.41
5	Correspondence	s.41
6	Correspondence	s.41
7	Correspondence	s.41
8	Correspondence	s.41
9	Submission requesting legal advice	s.42
10	2007 Copyright agreement and appendix (Law Society signed)	s.41

Section 41(1)

16. Section 41(1) of the Act provides that information is exempt from disclosure if it was obtained by the DCLG from any other person and its disclosure would constitute an actionable breach of confidence. The exemption is absolute and therefore not qualified by the public interest test set out in section 2 of the Act.
17. The Information Commissioner notes that section 41(1) of the Act has been applied to seven letters sent or received by it in connection with the CON29 form, and to one letter between the Law Society and the ODPM.
18. The Information Commissioner has reviewed each item of information withheld under this exemption.

Bundle 2

19. The Information Commissioner accepts that the information in this bundle is exempt under section 42 (for reasons explained below) and therefore has not gone on to consider the application of section 41(1) to it.

Bundle 3

20. This bundle comprises a two-line covering letter and the DCLG's signed copy of the 2006 copyright and licensing agreement. The agreement sets out the permitted use of the CON29 forms, which is contained in the appendix to the agreement.

The covering letter

Was the information obtained from another person?

21. The letter was sent by the DCLG to the Law Society and does not contain within it information obtained from another person.
22. The Information Commissioner therefore does not consider that section 41(1) is engaged by this information.

The copyright and licensing agreement

Was the information obtained from another person?

23. The Information Commissioner's published position¹ is that a concluded contract agreed between a public authority and another person is not usually information being provided by one party and obtained by the other. Therefore, in most cases, information in a concluded contract cannot benefit from the section 41 exemption because it has not been obtained by the public authority from another party.
24. In looking at this bundle of information, the Information Commissioner has been guided by the Tribunal's comments on the application of section 41(1) to concluded contracts² which, while stating that a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act, nevertheless noted:

"We are also conscious of the fact that contracts will sometimes record more than just the mutual obligations of the contracting parties. They will also include technical information, either in the body of the contract or, more probably, in separate schedules. Depending, again, on the particular circumstances in which the point arises, it may be that material of that nature could still be characterised as confidential information "obtained" by the public authority from the other party to the contract, (or perhaps a "trade secret" under section 43(1) of the Act) in which event it may be redacted in any disclosed version".

25. The agreement between the DCLG and the Law Society was concluded by the time the complainant made his request. The Information Commissioner has therefore considered whether it nonetheless contained technical information which could be deemed to have been obtained from the Law Society. However, he has decided that the main body of the contract is in fact a straightforward mutually agreed record of the obligations of each of the contracting parties, and therefore that it does not constitute information obtained from another person.

¹ ICO guidance on section 41: Information provided in confidence relating to contracts, Version 1 24 October 2008

² *Derry City Council v Information Commissioner (EA/2006/0014)*

26. He therefore does not consider that the main body of the agreement is covered by the exemption at section 41(1).

Appendix – CON290 and CON29R

Was the information obtained from another person?

27. Appended to the contract are the two CON29 forms to which the contract relates. The CON29 forms were devised by the Law Society and it claims the copyright in respect of them. The Information Commissioner is therefore satisfied that these are items of information which have been obtained from another person, and has gone on to consider the next element of the exemption.

Would disclosure constitute an actionable breach of confidence?

28. The Information Commissioner has considered the test set out in *Coco v A N Clark (Engineers) [1968] FSR*. This test states that a breach will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence;
- there was an unauthorised use of the information to the detriment of the confider; and
- there is no public interest defence on which the DCLG can rely.

29. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as generally accessible, although information that has been disseminated to the general public clearly will be. Information which was important to the confider cannot be considered to be trivial.

30. Forms CON 29R and 29O are specifically designed for use in connection with property transactions by solicitors and others conducting land searches. They are available for purchase from law stationers and can be downloaded from local authority websites. The Information Commissioner therefore does not consider them to have the necessary quality of confidence for their disclosure to constitute an actionable breach of confidence.

31. The Information Commissioner has therefore concluded that the appendix is not covered by the exemption at section 41(1). Since the

DCLG has not claimed any other exemption applies the information should therefore be disclosed.

Bundle 4

32. This item comprises a covering letter, a copy of a letter from the Law Society and a copy of the contract.

The covering letter

Was the information obtained from another person?

33. The letter was sent by legal advisors for the Law Society. Therefore, the Information Commissioner considers it constitutes information which has been obtained from another person.

Would disclosure constitute an actionable breach of confidence?

34. The covering letter acknowledges receipt of the DCLG's signed copy of the agreement and states that the Law Society's copy is enclosed, together with another letter from it.
35. Following the test used in paragraph 28, above, the Information Commissioner does not consider that the information in this letter has the necessary quality of confidence for its disclosure to constitute an actionable breach of confidence. He therefore does not consider that section 41(1) applies in respect of the covering letter.

The Law Society's letter

Was the information obtained from another person?

36. The letter was sent by the Law Society to the DCLG. It sets out some residual points pertinent to the operation of the agreement between the two parties. The Information Commissioner accepts that this constitutes information obtained from another person.

Would disclosure constitute an actionable breach of confidence?

37. The letter states that the Law Society will waive certain legal rights during the early stages of the operation of the agreement, ending at the commencement date specified in the agreement.
38. The Information Commissioner understands that this agreement to waive legal rights applied only in respect of the Crown's use of the CON29 forms and that it ended in 2007.
39. Whilst the Information Commissioner accepts that this information may have had some sensitivity at the time the agreement was in force, its

age and the relatively straightforward nature of the agreement mean that by the time the complainant requested it, it lacked the necessary quality of confidence for its disclosure to constitute an actionable breach of confidence.

40. The Information Commissioner therefore does not consider that section 41(1) is engaged by the letter.

The contract and its appendix

41. The contract is identical to the one at item 3, except it is signed by the Law Society rather than the DCLG (for the Crown).
42. The Information Commissioner's view is the same as for item 3, which is that section 41(1) is not engaged by either the contract or its appendix.

Bundles 5, 6, 7 and 8

43. Having carefully considered the information contained within these bundles, the Information Commissioner has decided that the exemption at section 41(1) is engaged by the information contained within them, and that the DCLG is not required to disclose them.
44. Occasionally the content of the exempt information being considered is such that it is not possible to provide an analysis of the Information Commissioner's thinking without disclosing information which would itself be exempt. This is the case here, and so the reasons for the Information Commissioner's decision on these bundles are set out in the attached confidential annex.

Bundle 10

The contract and its appendix

45. The contract replaces the one signed by the Law Society and the DCLG in 2006. The Information Commissioner's view is the same as for bundle 3, which is that section 41(1) is not engaged by either the contract or its appendix.

Section 42 - The legal professional privilege exemption

46. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege ("LPP") could be maintained in legal proceedings. This exemption is subject to a public interest test.
47. There are two types of LPP; advice privilege and litigation privilege. After considering the arguments the DCLG has made, together with the withheld information in question, the Information Commissioner

considers that it has argued that this information is subject to advice privilege.

48. For advice privilege to apply, the information must be confidential, made between a client and a professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

Bundles 1, 2 and 9

49. The DCLG has applied this exemption to three communications between it and an individual who is a professional legal advisor. These are: two requests for legal advice to be provided and one instance of legal advice being given.
50. The Information Commissioner is satisfied that these communications remain confidential, were 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. Therefore, the Information Commissioner considers that advice privilege applies to the information contained in each of the three communications and that section 42(1) is engaged in relation to this information.
51. The Information Commissioner has gone on to consider the public interest test – namely whether the public interest in maintaining the exemption outweighs the public interest in disclosure. In doing so, the Information Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:

"...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 interest....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 case..."

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption"

52. The Information Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Information Commissioner has also noted

the comments of the Tribunal in *Calland v Information Commissioner (EA/2007/0136)* that the countervailing interest must be “clear, compelling and specific”.

Public interest arguments in favour of disclosing the requested information

53. While the complainant has argued that it is not in the public interest to refuse to disclose the information, he has not provided information as to his reasons for requesting it (as is his right) and so the Information Commissioner is unaware of any particular public interest arguments relating to the particular context of his request.
54. The DCLG recognised that the public interest could be served by the disclosure of the information as it would help provide assurance that legal advice was being sought where appropriate to inform policy making, and making the content of that advice available would open up to public scrutiny whether that advice was accurate, informed and appropriate to the circumstances.

Public interest arguments in favour of maintaining the exemption

55. The DCLG argued that there is a well established and accepted convention that confidentiality in the lawyer/client relationship, and in the advice sought from and given by legal professionals, should be protected. This facilitates complete openness between client and lawyer which, if not protected, would undermine confidentiality and prejudice the client's interests. The public interest in disclosure of legally privileged information can only override the need for confidentiality in rare circumstances where the public interest in disclosure is so clear and persuasive as to outweigh the accepted need to protect lawyer/client confidentiality. In this case, the DCLG did not consider there to be any particularly strong arguments that would warrant not maintaining confidentiality.

Balance of the public interest arguments

56. The Information Commissioner recognises that there is an assumption built into the Act that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to their activities.
57. The Information Commissioner has also had regard for the age of the information, which ranges between four and seven years old. In general, the sensitivity of information is likely to diminish with age.

58. Set against this, the Information Commissioner accepts that the concept of legal professional privilege and the rationale behind the concept of ensuring frankness between lawyer and client, serves the wider administration of justice. It is in the public interest to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice.
59. It is also important that a public authority is able to seek legal advice so that it can make its decisions in the correct legal context. Thus, the Information Commissioner accepts there is an inbuilt public interest in the maintenance of LPP.
60. Bearing these points in mind, and having considered the withheld information in question, the Information Commissioner considers that the public interest in maintaining this exemption outweighs the public interest in favour of disclosure and that the DCLG is therefore not required by the Act to disclose it.

Documentation relating to the formation of any working group to review the current 2007 version questions

61. Although the complainant did not challenge the DCLG's claim that it did not hold any information covered by the second part of the request, the Information Commissioner nevertheless considered it appropriate to ask the DCLG for more information in support of its statement.
62. In response, the DCLG clarified that it held no information because no such working group, as described in the request, was ever set up. The Information Commissioner then asked the DCLG to clarify whether it held any recorded information about the decision not to set up such a working group, as this would fall within the scope of the request. The DCLG confirmed that it had checked its records and that it was satisfied that it held no information about any consideration given as to whether or not to set up a working group.
63. In scenarios where a public authority claims not to hold information, the Information Commissioner applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints, he must decide whether, on the balance of probabilities, a public authority held at the time of the request any information which falls within the scope of the request.
64. In this case, having considered the DCLG's explanation, and with no information which suggests the contrary supplied by the complainant, the Information Commissioner is satisfied that on the balance of probabilities the DCLG does not hold any information covered by the second part of the request.

Right of appeal

65. 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

66. 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.
67. 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

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