

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 May 2012

**Public Authority:** Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

#### Decision (including any steps ordered)

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1. The complainant requested information withheld under sections 35(1)(a) (information relating to the formulation or development of government policy) and 42(1) (legal professional privilege) in response to a previous request for information relating to a 1982 share sale in Zambia. The Foreign and Commonwealth Office (FCO) stated that all the information previously withheld under section 35(1)(a) had subsequently been disclosed to the third party who made the previous request. In relation to section 42(1), the FCO maintained that this exemption applied.
2. The Commissioner's decision is that the FCO applied the exemption provided by section 42(1) correctly to all but one of the documents in relation to which it was cited. In relation to section 35(1)(a), the Commissioner finds that the response from the FCO did not meet the requirements of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose to the complainant the one document in relation to which the Commissioner has found that section 42(1) was not engaged.
  - In relation to the information withheld from the previous requester under section 35(1)(a), respond to the complainant again with a confirmation or denial as to whether this information is held. For any information that is held, this should either be disclosed, or the complainant should be provided with an explanation of the valid reasoning for why this will not be disclosed.

4. 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 Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 6 December 2010, the complainant wrote to the FCO and requested information in the following terms:

*"I confirm that you have previously supplied my partner ... with a quantity of documents that relate to a share sale he was involved with in Zambia in 1982.*

*I would now be grateful if you could supply me with those documents that you have previously withheld [from ... under sections 35(1)(a) and 42(1)]."*

6. The FCO responded substantively on 30 March 2011. It stated that everything previously withheld under section 35(1)(a) (information relating to the formulation or development of government policy) has since been disclosed to the complainant's partner under section 7 of the Data Protection Act 1998 (the DPA). In relation to the information previously withheld under section 42(1) (legal professional privilege) the FCO maintained that this exemption continued to apply.
7. Following an internal review the FCO wrote to the complainant on 10 June 2011. It stated that the citing of the exemption provided by section 42(1) was upheld.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way her request for information had been handled. At this stage the complainant referred only to the application of section 42(1) and did not specify any issues relating to the previous citing of section 35(1)(a) or the statement of the FCO that all information previously withheld under this exemption had subsequently been disclosed to her partner.

9. Later in the case handling process the complainant contacted the Commissioner's office and raised issues concerning the previous citing of section 35(1)(a). In short, the complainant did not accept that the information received by her partner from the FCO represented all information that had been withheld under section 35(1)(a).
10. A breach of the FOIA through the response of the FCO concerning the information previously withheld under section 35(1)(a) is recorded in this notice. Whilst the FCO was previously advised that the scope of this case would cover only the citing of section 42(1), following the complainant raising issues relating to the information previously withheld under section 35(1)(a) during the investigation, a decision was taken to assist the complainant by recording the attendant breach of the FOIA in this notice.

## **Reasons for decision**

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### **Sections 1 and 17**

11. Sections 1 and 17 of the FOIA require that a public authority should respond to a request by confirming or denying whether the requested information is held and, in relation to any information that is held, either disclose this or provide a valid reason for why this information will not be disclosed. In relation to the part of the request that was for information previously withheld under section 35(1)(a), the FCO did not comply with this requirement.
12. The response to the request referred to a finding by the Information Commissioner that the information withheld under section 35(1)(a) was the personal data of the complainant's partner, who was the complainant in that case, and so was exempt from the duty to confirm or deny under section 40(5) of the FOIA. As mentioned above it also stated that all of this information had been disclosed to the complainant's partner under the DPA.
13. That this information was later found to be subject to an alternative exemption does not alter that the FCO initially cited section 35(1)(a) in response to the request made by the complainant's partner. In order to respond to the request in accordance with the FOIA the FCO should have confirmed or denied if it continued to hold the information in relation to which it had previously cited section 35(1)(a). In relation to any information that was held, it should have either disclosed this, or given valid reasons for why this information would not be disclosed. At paragraph 3 above the FCO is now required to take this action.

## Section 42

14. Section 42(1) provides that information that is subject to legal professional privilege is exempt from disclosure. Consideration of this exemption is a two-stage process; first, it must be established if the information in question is subject to legal professional privilege (LPP), in which case the exemption will be engaged. Secondly, the balance of the public interest should be considered. The information should be disclosed unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
15. The FCO is relying here on a claim of advice privilege. This is available where the information consists of confidential communications between a client and legal adviser made for the sole or dominant purpose of obtaining legal advice.
16. The Information Commissioner considers all but one of the documents in question to fall within two broad categories. In the first of these categories are documents which record communication between officials and legal advisers in which legal advice is sought and given. In relation to these documents, the Commissioner recognises that these are clearly covered by LPP and hence the exemption provided by section 42(1) is engaged in relation to this information.
17. The second category consists of documents which record communications which do not involve legal advisers, but in which reference is made to legal advice provided elsewhere. The position of the FCO is that this information summarises legal advice provided elsewhere and so LPP extends to this.
18. Whilst this information is less clearly covered by LPP than that in the previous category, the Commissioner accepts that the content of the information here does summarise advice that was provided by a legal adviser to a client in the expectation of confidence. LPP therefore does extend to this information and the conclusion of the Commissioner in relation to this information is that the exemption provided by section 42(1) is clearly engaged.
19. The principle of legal professional privilege will only apply to communications that are confidential to the world at large. Where legal advice has been placed in the public domain or has been disclosed without any restrictions placed on its further use, privilege will have been lost. The Commissioner has seen nothing to suggest that the legal advice in this case has been disclosed, thus waiving privilege, and he is

satisfied that section 42(1) is engaged in respect of the information covered above.

20. In relation to one document, a minute dated 26 August 1999, the view of the Commissioner is that this does not fit into either of the categories identified above. This neither directly records legal advice, nor summarises such provided elsewhere. The FCO made two arguments as to why this was subject to LPP; the first being that whilst the author of this document was not a qualified legal adviser, the content of this consists of advice of a legal nature. Secondly, the FCO noted that this document had been copied to a legal adviser and stated that this indicated that this document was intended to keep a legal adviser informed.
21. In response to the first argument, the Information Commissioner does not accept that advice provided by someone other than a professional legal adviser can be subject to advice LPP. In response to the second argument, the Commissioner may have accepted this if this document stemmed directly from legal advice, or clearly had the intention of feeding into legal advice. This does not appear to have been the case, however. In relation to this document, the conclusion of the Commissioner is that this is not subject to LPP and so does not engage the exemption provided by section 42(1). At paragraph 3 above, the FCO is required to disclose this document.
22. In relation to those documents for which the Information Commissioner has found that this exemption is engaged, it is necessary to go on to consider the balance of the public interest. In considering the balance of the public interest in connection with section 42(1), the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest. This includes what harm may result, and what benefit to the public interest may result, through disclosure of the information in question. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

*"...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..."* (paragraph 35).

23. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, elevated to an absolute exemption.
24. Turning to those factors in favour of disclosure in this case, the Information Commissioner recognises a general public interest in favour of disclosure on the grounds of improving the openness and transparency of the FCO. In this specific information the Commissioner recognises that there is some public interest in understanding more about how the FCO reacted in a situation where a British national was facing a difficult situation overseas. The Commissioner does not consider this factor to be of particularly significant weight, however.
25. It is important to note that private interests are not relevant here. Whilst the information in question would likely be of great and undoubtedly justified import to the complainant and her partner, there is no evidence as to how their position is relevant to the balance of the public interest and so cannot be taken into account here.
26. In line with the relevant case law, the Information Commissioner accords significant weight to the maintenance of LPP. Whilst the Commissioner remains mindful that this should not mean that this exemption becomes effectively absolute, it is the case that there will need to be very clear and specific public interest grounds for the public interest in the maintenance of LPP to be overridden. Having reviewed the withheld information and taking all the circumstances into account, the view of the Commissioner is that there are not sufficiently clear and specific grounds in favour of disclosure in this case and so he considers that the public interest in maintaining LPP outweighs the limited public interest he has recognised in favour of disclosure of this information. The FCO is not, therefore, required to disclose this information.

## Right of appeal

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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](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)

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** .....

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
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