

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2012

Public Authority: Department for Environment Food and Rural Affairs (DEFRA)

Address: Area 1/B, Ergon House
Horseferry Road
London
SW1P 2AL

Decision (including any steps ordered)

1. The complainant has requested the legal advice received by DEFRA to inform its decision as to whether it should pursue prosecutions of particular named abattoir owners. DEFRA withheld the requested information under section 30(1)(C) and section 42 of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that DEFRA has correctly applied section 42 FOIA to withhold the requested legal advice.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 18 July 2011, the complainant wrote to DEFRA and requested information in the following terms:

"We'd like details of the independent solicitor you claim advised DEFRA to drop the case against Tom Lang Ltd., J H Lambert, A & G Barber and Cheale Meats Ltd and details of when the advice was given and when decisions were made to drop the cases. This is not legal advice or legally privileged material and will be a normal press enquiry.

We'd also like to see the legal advice issued to DEFRA for each of these cases. You stated the information won't be released under the Freedom of Information Act due to it being legally privileged. I would therefore like to request an internal review of this decision. If the result of this review is the information should not be released, you must state clearly

why your decision overrides the public interest in the information being disclosed.”

5. DEFRA provided a response to the complainant on 25 July 2011 in which it refused to disclose the legal advice on the basis of the exemptions contained in section 30(1)(c) and section 42 of the FOIA.
6. The complainant requested an internal review of the public authority's decision on 7 September 2011. On 2 November 2011 the public authority wrote to the complainant with the details of the result of the internal review it had carried out. It explained that his request for internal review had focused upon the legal advice and not the other parts of the request. DEFRA therefore focused its internal review solely upon the legal advice. The complainant did not dispute the approach taken by DEFRA. DEFRA upheld the application of section 30(1)(c) and section 42 to withhold the legal advice.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether DEFRA had incorrectly withheld the legal advice requested in this case.
8. The Commissioner has therefore considered whether or not DEFRA was correct to withhold the requested legal advice under section 30(1)(c) or section 42 FOIA.

Reasons for decision

9. Section 42 of FOIA states that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
10. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
11. DEFRA has confirmed that in this case it is relying on both categories of privilege. The Commissioner will first consider the category of advice privilege. This privilege applies to communications between a client and their legal advisers where there is no pending or contemplated

litigation. Furthermore the information must be communicated in a professional capacity.

12. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
13. DEFRA explained that the withheld information is a piece of legal advice provided to it by its legal advisers. It confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
 - a. confidential;
 - b. made between a client and professional legal adviser acting in their professional capacity; and
 - c. made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.
14. DEFRA also confirmed that it was satisfied that the privilege attached to the withheld information had not been waived.
15. Upon considering the withheld information and the submissions provided by DEFRA, the Commissioner considers that the section 42 exemption was correctly engaged.
16. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.
17. The 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."

18. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The 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

19. DEFRA has acknowledged that there is a public interest in disclosure of information concerning the decisions taken in relation to the prosecution of abattoir owners.
20. The Commissioner also considers that there is a public interest in openness and transparency of the decision making process and in providing the public with a better understanding of how such decisions are made.

Public interest arguments in favour of maintaining the exemption

21. DEFRA has argued that there is a strong public interest in withholding information which is subject to legal professional privilege. It said that in this case the information relates to prosecutions or potential prosecutions, therefore it is essential that it can obtain high quality, comprehensive legal advice to inform its decision as to whether or not to pursue a prosecution. It explained that this advice needs to be given in context and with the full appreciation of the facts and without such comprehensive advice, the quality of Defra's decision making would be lessened as it would not be fully informed, and this would not be in the public interest.
22. It went on to explain that disclosure of legal advice would significantly prejudice the public authority's ability to defend its legal interests, leading to wasted resources, which again would not be in the public interest. It also said that there was considerable public interest in the proper administration of justice and the concept of legal professional privilege plays an important role in maintaining this.
23. DEFRA said that the disclosure of legal advice examining the arguments and counter-arguments relevant to prosecutions may prejudice DEFRA's ability to defend its legal interests by unfairly exposing its legal position to challenge. DEFRA's ability to defend its legal interests (were it to pursue prosecution in the cases to which the advice relates or in future) may also be prejudiced if Ministers' and

officials' are not able to rely on advice having been presented without limitation or omission.

24. DEFRA also said that the age of the withheld information is relevant. Although the public interest in maintaining an exemption diminishes over time, the withheld advice in this case remains relevant to ongoing proceedings, if not to the cases mentioned in the legal advice, to other similar cases and decisions about future proceedings.

Balance of the public interest arguments

25. The Commissioner considers that there is a public interest in disclosure of information concerning the decisions taken in relation to the prosecution of abattoir owners. He also considers there is a public interest in openness and transparency of the decision making process and in providing the public with a better understanding of how decisions to prosecute are made by DEFRA.
26. The Commissioner agrees that there is a strong public interest in DEFRA being able to obtain independent legal advice to inform its decision making processes in relation to prosecutions of abattoir owners. The Commissioner considers that it is in the public interest for this advice to be sought and received in a full and frank manner so the DEFRA is fully informed when making such decisions.
27. The Commissioner also considers that disclosure of the legal advice may reveal strengths as well as weaknesses in any potential prosecution which he agrees would unfairly expose DEFRA's legal position. He considers that it is not in the public interest to prejudice DEFRA's legal position in relation to any potential or future prosecutions.
28. The Commissioner also considers that the withheld information is relatively recent and as it remains relevant to ongoing proceedings this strengthens the public interest arguments in favour of maintaining the exemption.
29. The Commissioner considers that public interest in maintaining the exemption outweighs the public interest in disclosure in this case.
30. As he is satisfied the information has been correctly withheld under section 42 (1) the Commissioner has not gone on to consider the application of section 30(1)(c).

Right of appeal

31. 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

32. 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.
33. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
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Water Lane
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