

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 September 2012

Public Authority: Northern Ireland Water
Address: Westland House
Old Westland Road
Belfast
BT14 6TE

Decision (including any steps ordered)

1. The complainant requested information which formed a submission to Northern Ireland Water's (NIW) lawyers and on which legal advice was given. NIW refused to disclose the information and relied on section 42(1) and section 40(1) to withhold the information.
2. The Information Commissioner's decision is that NIW was correct to classify the requested information as attracting legal professional privilege and to withhold the information under section 42(1) of FOIA. It also correctly applied section 40(2).

Request and response

3. The complainant made two requests to NIW; the first on 14 April 2011 and the second on 23 June 2011. Both requests related broadly to the same topic; however, the complainant only specifically complained to the Information Commissioner about the handling of the second request.

Request dated 14 April 2011:

'At the Disciplinary Hearing yesterday you mentioned that HR had received legal advice in writing regarding on-call being a contractual obligation. Please can you forward a copy of this legal advice?'

Request of 23 June 2011:

'Further to the request I made to you on 14 April 2011 for the written legal advice provided to NI Water by [named lawyers] on whether or not standby/on-call is contractual. Can you please advise what information was sent to [named lawyers] for advice?'

4. On 19 July 2011 NIW wrote to the complainant in response to his request of 23 June 2011 and refused to provide the requested information under section 42(1) (legal professional privilege).
5. Following an internal review NIW wrote to the complainant on 30 August 2011. It stated that it could disclose some of the previously withheld information to the complainant as it was his personal information but that it was redacting the personal data of third parties under section 40(2) (personal information). NIW also maintained its position that the remainder of the information attracted legal professional privilege and was exempt under section 42(1) of FOIA.

Scope of the case

6. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled.
7. In order to scope his investigation the Information Commissioner asked NIW to provide him with details of its handling of the request together with a copy of the withheld information.
8. The Information Commissioner also asked the complainant to confirm the scope of his complaint.
9. The complainant told the Information Commissioner that he was only seeking a copy of the communication that was sent by NIW to its lawyers and on which the lawyers gave their advice.
10. The scope of the Information Commissioner's investigation focussed on whether the withheld information attracted legal professional privilege and was therefore exempt by virtue of section 42(1). He also focussed on whether NIW was correct to redact some third party information under section 40(2) of FOIA from the information that it had subsequently disclosed on 30 August 2011.

Reasons for decision

Section 42(1) Legal professional privilege

11. This exemption 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.
12. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her

legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege and litigation privilege.

13. In this case, NIW sought to rely on advice privilege. Advice privilege will apply where no litigation is in progress or being contemplated.
14. NIW informed the Information Commissioner that its Human Resources Directorate required legal advice on the contractual obligations of staff to undertake on-call rota duties. It explained that a member of its HR department sought advice from its external lawyers on this subject and had established that in this case it was the client and its lawyer was the legal advisor.
15. NIW provided the Information Commissioner with a copy of the withheld information as well as a copy of the redacted version which was provided to the complainant.
16. Having inspected the information the Information Commissioner is satisfied that the communications are 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.
17. The Information Commissioner is therefore satisfied that:
 - the information is communication between NIW and its lawyers;
 - the information was created for the purposes of seeking or providing legal advice; and
 - the information has not been disclosed or made public.
18. The Information Commissioner having reviewed the withheld information together with the arguments put forward by NIW is satisfied that the withheld information remains subject to legal professional privilege.
19. As section 42(1) is subject to a public interest test the Information Commissioner has considered whether in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

The public interest test

20. The Information Commissioner has published guidance on the application of section 42¹ which explains the inbuilt public interest in the exemption.
21. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
22. The Information Commissioner considers that the public interest arguments for disclosing the information must be strong. This was considered in the following Tribunal case of *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006):

“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 public interest”.

23. The Information Commissioner considers that it is also important when analysing the public interest arguments to take into account the nature and type of information and what it reveals. In this case the information is about a contractual disagreement with an employer. The information is specifically about whether the requirement to be on an ‘on-call’ rota is contractual or not.

Public interest in disclosing the information

24. NIW told the Information Commissioner that it had taken into account the inbuilt public interest in the exemption and the principle of being able to consult a lawyer in confidence.
25. NIW argued that there is a public interest in NIW being accountable for the quality of their decision making based on legal advice. It recognised that transparency in the decision making process could enhance that accountability.

1

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.ashx

26. Being specific to the information in this case NIW told the Information Commissioner that it provides a service to the public that relies on the availability of its staff through on-call rotas. It said that disclosing the information could lead to the public being assured that NIW had adequate provisions in place to meet its obligations.
27. The Information Commissioner agrees that there is a general public interest in transparency and openness of decision making by public authorities. In this case he attributes some weight to the argument for disclosure of legal advice on which decision making is based in order to increase awareness and accountability. The information in question relates to legal advice on the subject of the ability of NIW staff to participate in on-call rotas, which the Information Commissioner understands would be of interest to the public that NIW is meeting its obligations.

Public interest in maintaining the exemption

28. NIW argued that it, and other public authorities, needed to make decisions within a fully informed legal context. It argued that high quality, comprehensive legal advice was required for the effective conduct of its business and that should the information be disclosed, the quality of NIW's decision making would be reduced and this would not be in the public interest.
29. NIW also argued that disclosure of the information could lead to NIW not being able to defend its legal interests. It said that this could be either by unfairly exposing its legal position to challenge or by diminishing the reliance it could place on the legal advice being given. It also argued that legal advisors may be reluctant or fearful to provide or record advice. It told the Information Commissioner that neither of these were in the public interest and could lead to NIW being forced to defend its position using public resources, which again would not be in the public interest.
30. NIW argued that if the information were disclosed that this could lead to lawyers and clients avoiding making a full permanent written record of advice that is sought or given. It argued that it is in the public interest that the provision of legal advice is fully recorded in writing and that the process of decision making is described accurately as such advice may need to be referred to again in the future.
31. NIW also argued that when legal advice has been sought or given on one topic that it is likely that it may be relevant to other subsequent issues. It stated that it may be the case that legal advice sought or given in connection with one department may equally have implications for other departments and that it would not be in the public interest for a single disclosure of legal advice to be made as this could damage the

long term relationship between a lawyer and client. It added that such decisions needed to be considered in the wider context.

32. The Information Commissioner accepts that the client / lawyer relationship is an important one and recognises that the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. Accordingly he attributes significant weight to the arguments against disclosure.

Balance of the public interest arguments

33. NIW has presented strong arguments in favour of maintaining the exemption – in particular the Information Commissioner accepts that disclosure of the information could lead to lawyers and clients being reluctant to accurately or permanently record information on which decisions were based. He also accepts that the disclosure of the information could lead to unwarranted litigation at a cost to the public purse.
34. Whilst the Information Commissioner accepts that there is a general public interest in transparency and openness in decision making he is not convinced that the public interest falls in favour of disclosure. In this case the request was made in the context of whether a requirement to work an on-call rota was contractual. The information itself does not attract a strong public interest as it does not involve the expenditure of large sums of public money and is not widely considered to be a contentious issue.
35. Having balanced the arguments the Information Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not outweighed by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in favour of maintaining the exemption at section 42(1) outweighs the public interest in favour of disclosure.

Section 40 Personal data

36. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA)
37. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as

defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data’ means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

38. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

39. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

40. The Information Commissioner notes that in this case NIW applied section 40(2) to a number of redactions of names of staff, dates of employment and job locations from the information. The Information Commissioner is therefore satisfied that the information in question is personal data in accordance with the Data Protection Act. Accordingly he finds that section 40(2) is engaged.

41. NIW told the Information Commissioner that it had considered a number of issues when assessing whether it would be fair to disclose the personal data. It argued that there was a reasonable expectation by the named staff members that the information would not be disclosed and that disclosure would cause unwarranted intrusion into their private lives. It also argued that it had also considered the seniority of those staff but determined that they were not of a senior level and therefore did not have a public profile that would warrant disclosure.

42. NIW informed the Information Commissioner that it had balanced the rights and freedoms of the data subjects and the legitimate interest of NIW and that whilst NIW are accountable to the public, the disclosure of the staff names, employment dates and grades would be of no benefit to

the public at large and would cause unwarranted intrusion into the private lives of the individuals in question.

43. The Information Commissioner has carefully considered the information and is clear that a number of individuals could be identified from some or all of it. He also notes that it would not have been the reasonable expectation of any of the named individuals that their information would be disclosed. Having taken this into account the Information Commissioner has determined that it would not be fair to disclose the information and that NIW correctly applied section 40(2).

Right of appeal

44. 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

45. 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.
46. 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

Jon Manners
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