

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 November 2012

**Public Authority:** Department for Communities and Local Government

**Address:** Eland House  
Bressenden Place  
London  
SW1E 5DU

#### Decision (including any steps ordered)

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1. The complainant requested information relating to legal advice sought on a particular case. The Department for Communities and Local Government (DCLG) refused to confirm or deny that it held the information citing section 42(2) of FOIA.
2. The Commissioner's decision is that DCLG correctly refused to confirm or deny that the information is held in accordance with section 42(2) of FOIA.

#### Request and response

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3. On 14 April 2011, the complainant wrote to DCLG and requested information in the following terms:  
  
*"1) Did the Secretary of State and/or CLG Ministers and/or DCLG seek legal advice in relation to the implications of allegations that a DCLG source was quoted in The Times as saying that [named individual] (a member of the Audit Commission Board) had "built her career on incompetence", "milked the taxpayer" and was "not fit for the role".?*  
  
*2) Who was consulted in relation to my FOI request dated 3<sup>rd</sup> March 2011, concluding in the response set out in your letter of 1<sup>st</sup> April 2011."*
4. DCLG initially responded on 18 May 2011. It stated that the member of staff previously dealing with the request had now left the department. However, DCLG told the complainant that it considered that the request

would be exempt under section 42 of FOIA and that it required additional time to consider the public interest arguments.

5. DCLG wrote to the complainant again on 16 June 2011, 15 July 2011 and 28 July 2011 each time explaining that it was extending the time to respond to the request in order that it could consider its public interest arguments.
6. The complainant informed the Information Commissioner of the delay in responding to his complaint and the Information Commissioner initiated an investigation. During the investigation DCLG provided a response to the complainant dated 20 January 2012. It concluded that the public interest in refusing to acknowledge whether or not legal advice was sought significantly outweighs that in disclosure. Consequently it concluded that DCLG's duty under section 1(1)(a) of the Freedom of Information Act 2000 did not apply, by virtue of section 42(2).
7. On 29 February 2012 the complainant requested an internal review – only in relation to question one of his request – of the decision to neither confirm nor deny that information was held.
8. DCLG completed an internal review on 30 March 2012. It informed the complainant that it was maintaining its reliance on section 42(2) in neither confirming nor denying that the information is held and as outlined in its refusal notice dated 20 January 2012.
9. The Information Commissioner notes that on 27 March 2012 he issued a decision notice (reference FS50407172) detailing a breach of section 17(3) of FOIA in regards to the delay in responding to the request.

## Scope of the case

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10. The complainant contacted the Information Commissioner on 26 April 2012 to complain about the refusal to disclose the information. In particular he raised three aspects to his complaint:

"...

- *there is a presumption on disclosure, unless there are legislative prohibitions or exceptions where there are significant reasons why the balance falls against disclosure. I do not believe that to be the case here.*
- *my questions - those that DCLG has declined to answer - did not request any disclosure of information that was legally privileged.*

- *whereas it is obviously perfectly proper to withhold information that might prejudice (say) a police investigation, seeking to prevent the embarrassment [sic] of a Minister is clearly not a proper consideration".*
11. On 22 May 2012 the Information Commissioner contacted DCLG to ask it to provide details of its handling of the request. The full details requested by the Information Commissioner were not provided until 26 September 2012 despite repeated reminders by the Information Commissioner.
  12. The scope of the Information Commissioner's investigation therefore focussed on whether DCLG has correctly cited section 42(2) of FOIA in neither confirming nor denying whether the information is held in respect of question one of the request.

## Reasons for decision

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### Section 42 – legal professional privilege

13. Section 42 says that:

- (1) *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.*
- (2) *The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.*

14. The Information Commissioner has also published guidance<sup>1</sup> on section 42(2) which states:

*"Section 1(1)(a) FOIA requires a public authority to confirm or deny whether or not it holds information. However where information is covered by LPP, section 42(2) removes the duty to confirm or deny, if in doing so the authority would disclose any privileged information. The*

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/legal\\_professional\\_privilege\\_exemption\\_s42.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.ashx)

*information that the public authority would reveal by the confirmation or denial does not need to exist yet in recorded form.”*

15. Section 42(2) is also subject to a public interest test.
16. The Information Commissioner expects that the public authority must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The Information Commissioner accepts that the general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege (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.
17. DCLG told the Information Commissioner that it was applying section 42(2) to the requested information.
18. DCLG argued that section 42(2) exemption applies to information that would be subject to legal professional privilege if litigation were in progress and that the requested information would need to be part of, or relate to, communications between a client and lawyer for the predominant purpose of seeking legal advice or with a view to actual or likely litigation. Legal communications must also retain a quality of confidence to attract legal professional privilege. It stated that if the information within the scope of the request were held by it, it would be categorised as attracting legal professional privilege.
19. DCLG argued that legal professional privilege will not generally be attached to the fact of whether legal advice was sought or not, unless disclosing that fact would disclose something of substance which would serve to undermine its position. It argued that this is the situation in this case because the request asked specifically whether legal advice was sought. Confirmation of the fact that legal advice had or had not been sought would be unfairly and unreasonably seen as an admission by it that there was a case to answer. It argued that this would undermine its position and have an effect on its ability to defend its interests and would also lead to inferences being drawn about the likely content of any advice.
20. The Information Commissioner has carefully considered the arguments put forward by DCLG and on that basis is satisfied that the information, were it to be held, would attract legal professional and that the exemption is therefore engaged. Section 42(2) is subject to the public interest test and the Information Commissioner considers that arguments must be specific to the requirements of the exemption which

in this case is whether the public interest favours confirming or denying that the requested information is held.

### ***Public interest test***

#### *Arguments against maintaining the exemption*

21. DCLG argued that there is a public interest in that disclosure of whether it had sought legal advice on a specific topic might advance some public understanding of Government decision making. It said that this could lead to the public being better informed about how such a process works. It also accepted that there is a general public interest in the transparency and openness in Government.
22. The Information Commissioner accepts that there is a general public interest in the transparency of decision making in Government departments. He understands that such transparency can aid the public knowledge in how decisions are made and can lead to increased debate.

#### *Arguments in favour of maintaining the exemption*

23. DCLG argued that in this case there is a strong public interest in neither confirming nor denying that the information is held by it. It stated that this would ensure that Government decisions are taken in a fully informed legal context, and that Ministers and officials do not feel constrained in their ability to seek legal advice in a frank, open and timely manner. It added that this position is vital to the effective conduct of Government business, and in ensuring that the rule of law is upheld.
24. It also argued that if Government (ministers or officials) were required to routinely disclose every occasion on which it had sought advice, then that could lead to questions about why they had not sought advice in other cases, and create political pressure for them to seek advice even where legal involvement is not required, as well as additional pressure to disclose the content of the advice itself. It explained that this would not be conducive to the good conduct of public affairs and could lead to poorer decision making. It also argued that the disclosure of the topics on which legal advice is sought could also inhibit frank and confidential communications between ministers, officials and lawyers on future matters.

#### *Balance of arguments*

25. The Information Commissioner refers to a Tribunal case in which the Tribunal explained the balance of factors to consider when assessing the public interest test (*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".*

26. The Information Commissioner accepts the view of the Tribunal and understands that strong counterarguments would need to be presented in order to outweigh the public interest in maintaining the exemption.
27. The Information Commissioner understands that there is a genuine public interest in the workings of Government and that openness and transparency of decision making carries significant weight. He has also considered the strength of the arguments put forward by DCLG and accepts that the concept of legal professional privilege to protect the frankness of discussions between client and lawyer is very strong.
28. Having considered the views of the complainant and balanced that with those of DCLG the Information Commissioner accepts that the arguments for maintaining the exemption carry more weight and outweigh those against maintaining the exemption.
29. Accordingly the Information Commissioner finds that DCLG is correct to neither confirm nor deny that the requested information is held by it.

## Right of appeal

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30. 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)

31. 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.
32. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**