

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 April 2013

**Public Authority:** Home Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### Decision (including any steps ordered)

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1. The complainant requested a copy of legal advice provided to ACPO and held by the Home Office about the legality of offering speed awareness courses. The Home Office refused to disclose this information under the exemption provided by section 42(1) (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the Home Office cited this exemption correctly and so it is not required to disclose this information.

#### Request and response

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3. On 21 May 2012, the complainant's Member of Parliament (MP) made an information request to the Home Office, the wording of which was paraphrased in the refusal notice as follows:

*"...a copy of the Counsel's opinion that ACPO obtained on [the legality of police offers of Speed Awareness Courses to those detected exceeding the speed limit]."*

4. The Home Office responded on 27 June 2012, outside 20 working days from receipt of the request. It stated that the request was refused and cited the exemptions provided by sections 41 (information provided in confidence) and 42 (legal professional privilege) of the FOIA.
5. The complainant responded to this on 8 August 2012 and asked for clarification as to whether he could request an internal review, or whether it was necessary for his MP to do this. The Home Office took

this as a request for an internal review and responded with the outcome of the review on 3 September 2012. It stated that the refusal under the exemptions cited previously was upheld. Whilst some indication was given to the complainant of what public interest factors were believed to apply in relation to section 42, at no stage was any reasoning given for the citing of section 41.

## Scope of the case

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6. The complainant contacted the Commissioner on 22 October 2012 to complain about the way his request for information had been handled. The complainant indicated that he did not agree that the exemptions cited had been applied correctly and gave detailed reasoning for this.

## Reasons for decision

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### Section 42

7. Section 42(1) provides an exemption for information subject to legal professional privilege. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of the information being subject to legal professional privilege. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
8. Covering first whether the exemption is engaged, there are two types of legal professional privilege (LPP); advice privilege and litigation privilege. In this case advice privilege is claimed, which is described in the Commissioner's published guidance on this exemption<sup>1</sup> as follows:

*"Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice."*

9. The information in question here consists of advice provided to the Association of Chief Police Officers (ACPO) on the legal basis for the
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<sup>1</sup>[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/De-tailed\\_specialist\\_guides/legal\\_professional\\_privilege\\_exemption\\_s42.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/De-tailed_specialist_guides/legal_professional_privilege_exemption_s42.ashx)

National Driver Offender Retraining Scheme (NDORS). It is clear from the content of this information that this is legal advice provided from qualified legal advisers to their client ACPO.

10. The complainant has raised the question of whether the Home Office can claim legal professional privilege in relation to advice that was sought and received by a third party. The view of the Commissioner is that it can, for the following reasons.
11. If it were the case that the recipient of the legal advice had shown a willingness to disclose this widely, this may have indicated that it had waived LPP. In this case, however, there is no evidence that this information has been disclosed to any third party aside from the Home Office. As to whether the provision of this information to the Home Office constitutes a waiver of LPP, the Commissioner considers it significant that the Home Office is responsible for policing and so has an interest shared with ACPO on the legality of NDORS. As a result, the Commissioner does not believe that the provision of this information to the Home Office amounts to a waiver of LPP and that the confidentiality provided by LPP remains intact.
12. The complainant has also questioned whether ACPO was consulted over the disclosure of this information and raised the possibility that ACPO might consider LPP to have been waived, or be willing to waive it now. The Commissioner agreed that it would have been appropriate for the Home Office to have consulted ACPO about the complainant's request and raised this issue with the Home Office. In response to this the Home Office supplied evidence that it had consulted with ACPO and that ACPO did consider the legal advice in question to be confidential.
13. For the above reasons the Commissioner finds that this information is subject to LPP. The exemption provided by section 42(1) is, therefore, engaged.
14. The next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office, as well as those factors that apply in relation to the specific information in question here.
15. Dealing first with factors in favour of disclosure, the complainant has advanced arguments concerning the public interest in reassurance that NDORS does have a legal basis. The Commissioner agrees that in general there is a strong public interest in understanding the legal basis for NDORS. This is a scheme that affects many people and it is in the public interest to remedy any lack of understanding, which the complainant believes exists, about the legal basis for NDORS.

16. The complainant has also referred to the financial situation relating to these courses, pointing to the fee individuals are required to pay to take these courses and the profit generated as a result. The Commissioner agrees that the requirement for individuals to pay for these courses as an alternative to prosecution and that, as suggested by the complainant, these courses generate a profit, emphasises the public interest in understanding the legal justification for them. The Commissioner considers there to be a strong public interest in favour of full disclosure of this information in order to inform the public of the legal basis for NDORS. This is a valid public interest factor in favour of disclosure of considerable weight.
17. As to the public interest in favour of maintenance of the exemption, in any case where section 42 is found to be engaged, it is necessary to take into account the in-built public interest in this exemption; that is the public interest in the maintenance of LPP. 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).
18. 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. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
19. The public interest arguments advanced by the Home Office in this case emphasised the inbuilt public interest in the maintenance of LPP. Whilst the Home Office recognised the public interest in understanding the legal basis for NDORS, it suggested that this public interest had been served in this case by a disclosure of what it described as a '*comprehensive summary*' of the legal advice in question.
20. The complainant has argued that the summary disclosed does not sufficiently explain the law allowing for NDORS. However, aside from whether this document could be accurately described as a

'*comprehensive summary*' of the legal advice in question, the Commissioner does take this into account as evidence that an attempt has been made to place an explanation for the legal basis of NDORS into the public domain. This explanation was provided to the complainant's MP with the refusal notice.

21. The Commissioner agrees with the complainant that there is a strong public interest in understanding the legal basis for NDORS and that disclosure of the information in question here would serve that public interest. He has taken this into account here. Were it the case that no effort had been made to provide such an explanation, it is possible that the public interest in the information in question may have been sufficient to equal the public interest in the maintenance of LPP. In the event, however, the Commissioner recognises that an effort has been made to satisfy this public interest, whilst maintaining LPP. As a result, the Commissioner concludes that the public interest in the maintenance of LPP, and, therefore, in upholding the exemption provided by section 42(1), outweighs the public interest in disclosure. The Home Office is not, therefore, required to disclose the information in question.
22. As this conclusion has been reached on section 42, it has not been necessary to also consider section 41.

### **Other matters**

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23. As noted above, the complainant was provided with no explanation as to why section 41 was considered to apply to the information requested. Whilst the Commissioner no longer takes the approach of recording each procedural breach of the FOIA in decision notices, he would stress that section 17(1) of the FOIA requires that a refusal notice should explain why an exemption is believed to be engaged. This obligation exists in addition to it clearly being a matter of good practice to provide to a requester a thorough explanation of the reasoning behind the refusal of their request.
24. The Commissioner has made a record of this issue, as well as of the failure of the Home Office to respond to the request in this case within 20 working days of receipt. In relation to future requests, the Home Office should ensure that it explains why any exemption cited is believed to be engaged, as well as giving reasoning for the public interest conclusion in relation to any qualified exemptions that are cited.

## Right of appeal

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25. 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)

26. 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.
27. 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**  
**Cheshire**  
**SK9 5AF**