

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 June 2013

**Public Authority:** The Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

### Decision (including any steps ordered)

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1. The complainant requested information about the legal advice the Government has taken in relation to specific aspects of the Justice and Security Bill. The Ministry of Justice (MoJ) refused to disclose the requested information, citing section 42 (legal professional privilege). The complainant did not contest that the exemption is engaged. His concern was with respect to the public interest test conducted by the MoJ.
2. The Commissioner's decision is that the public interest favours the maintenance of the exemption and therefore the MoJ correctly withheld the information. He requires no steps to be taken.

### Request and response

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3. The complainant wrote to the MoJ on 1 November 2012 and requested information in the following terms:

*"I would like to make a Freedom of Information request to ask:*

*What legal advice the Government has taken regarding the compatibility of the provisions of the Justice and Security Bill with:*

- (1) The common law right to a fair trial*
- (2) Article 6 of the European Convention on Human Rights*

*And to request copies of any legal advice which the Government has taken on the above points".*

4. The MoJ responded on 9 November 2012 and confirmed that it held information within the scope of both parts of his request. However, it refused to provide the requested information, citing the section 42 exemption (legal professional privilege) as its basis for doing so.
5. Following an internal review the MoJ wrote to the complainant on 21 December 2012. The outcome of the internal review was that the MoJ upheld its original position.
6. Although refusing to disclose the requested information, the MoJ did, in accordance with its duty to provide advice and assistance, provide the complainant with links to information that is publically available and which it considered relevant to the subject matter of his request.

## Background

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7. The Justice and Security Bill (the Bill) became law during the course of the Commissioner's investigation. However, for the purposes of this decision notice, the Commissioner will refer to the Bill in terms of it being a proposal passing through Parliament – as it was at the time of the request.
8. According to the website [www.parliament.uk](http://www.parliament.uk):

*"A Bill is a proposal for a new law, or a proposal to change an existing law, presented for debate before Parliament.*

*A Bill can start in the Commons or the Lords and must be approved in the same form by both Houses before becoming an Act (law)".*
9. The website [www.parliament.uk](http://www.parliament.uk) provided the following summary of the Bill<sup>1</sup>:

*"A bill to provide for oversight of the Security Service, the Secret Intelligence Service, the Government Communications Headquarters and other activities relating to intelligence or security matters; to provide for closed material procedure in relation to certain civil proceedings; to prevent the making of certain court*

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<sup>1</sup> <http://services.parliament.uk/bills/2012-13/justiceandsecurity.html>

*orders for the disclosure of sensitive information; and for connected purposes”.*

10. According to that website, the Bill proposes<sup>2</sup>:
- strengthened oversight by the Intelligence and Security Committee (ISC) of the Security Service, the Secret Intelligence Service, the Government Communications Headquarters and other activities relating to intelligence matters;
  - to expand the statutory remit of the ISC and allow Parliament to have a more substantial role in ISC appointments;
  - to provide for closed material procedure in relation to certain civil proceedings in the High Court, the Court for Session or the Court of Appeal, and also to extend closed material procedure for cases containing sensitive information and connected purposes.
11. With respect to the concerns raised by the complainant, which are the subject matter of this decision notice, the Commissioner understands that the Bill proposes that, in some circumstances, judges will have the power to decide whether proceedings involving sensitive material should be heard in private.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 3 January 2013 to complain about the way his request for information had been handled.
13. The withheld information at issue in this case is described by the MoJ as being “*legal advice as communicated between lawyers and clients*”. In correspondence with the Commissioner, the MoJ confirmed that it considers that the information is subject to legal advice privilege.
14. The complainant does not dispute that the exemption is engaged. Nor is it in dispute that the Bill raises some complex issues about human rights law.
15. The complainant told the Commissioner:
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<sup>2</sup> <http://www.parliament.uk/business/news/2013/march/commons-remaining-stages-of-the-justice-and-security-bill/>

*"..my complaint focuses on the public interest exercise conducted by the MOJ with reference to my request, and on the outcome of that exercise".*

16. The Commissioner therefore considers the scope of his investigation to be the MoJ's consideration of the public interest test in respect of its application of the section 42 exemption to the withheld information.

## **Reasons for decision**

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### *Section 42 legal professional privilege*

17. Section 42 provides an exemption under FOIA for information protected by LPP (legal professional privilege). It is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### *Public interest arguments in favour of disclosing the requested information*

18. Although recognising the weight the courts give to the maintenance of legal professional privilege, the complainant told the MoJ:

*"it is also (as I understand it) the courts' position that in order for information within Section 42 to be disclosed, the reasons need not be exceptional".*

19. Referring to the legal advice at issue in this case he said:

*"I believe the public interest in disclosure of the Government's legal advice relating to the fair trial compatibility of the Justice and Security Bill is very strong, given the major changes which the Bill will make to the UK's justice system, and the apparent discrepancy between the view of the MoJ and the legal advice published by the Equality and Human Rights Commission".*

20. Arguing in favour of disclosure, the complainant told the Commissioner:

*"I would like to reiterate that firstly, I think there is a strong public interest case in publishing the legal advice, given that it relates to what is widely agreed to be a major departure from the traditions of open and equal justice, which has been the subject of major controversy among the press, the public and members of the Houses of Parliament; and secondly, that there is a very strong public interest case to be made for doing so as quickly as possible,*

*given that the Bill has already passed through the House of Lords and is currently under consideration by the House of Commons”.*

21. The MoJ acknowledged the general public interest in public authorities being accountable and recognised that access to information on which decisions have been made can enhance that accountability. It also told the complainant:

*“It could also be seen that there is a public interest in some cases in knowing whether or not legal advice had been followed”.*

22. During the course of his investigation, the MoJ told the Commissioner:

*“we were very aware that there has been a great deal of interest in the Bill and the compatibility of its clauses with Article 6 ECHR [European Convention on Human Rights] and common law fair trial concepts”.*

23. In light of that interest, the MoJ explained to the Commissioner that the Cabinet Office, as lead department for the Bill, has sought proactively to release information on this issue via a dedicated website<sup>3</sup>.

24. The Commissioner notes that the MoJ provided the complainant with a link to that website, explaining that it contains information regarding, for example, the Government’s legal position as to the ECHR compatibility of the Bill.

#### *Public interest arguments in favour of maintaining the exemption*

25. In favour of maintaining the exemption, the MoJ confirmed its view that there is a strong public interest:

*“in the Department being able to communicate freely with its legal advisers to provide and receive advice in confidence. Government departments require high quality and comprehensive legal advice for the effective conduct of their business”.*

26. It submitted that, without comprehensive legal advice that may not only include arguments in support of the final conclusions but also arguments that may be made against them, the quality of the government’s policy and decision-making would be much reduced.

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<sup>3</sup> <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/>

27. During the course of his investigation, the MoJ provided the Commissioner with further evidence in support of its view that the public interest in this case lies in favour of maintaining the exemption. In particular, it addressed the specific issues raised by the complainant, including his concern about "*the apparent discrepancy*" between the view of the MoJ and the legal advice published by the Equality and Human Rights Commission. Due to the content of those arguments, the Commissioner is unable to rehearse them here, as to do so would disclose information which is itself exempt.

*Balance of the public interest arguments*

28. Section 2(2) of FOIA requires consideration of all the circumstances of the case in deciding whether the public interest in maintaining the exemption outweighs that in disclosing the information. The Commissioner will only consider factors that are relevant to, and inherent in, the exemption being claimed when considering the maintenance of the exemption but will consider all public interest factors that relate to the disputed information when weighing the public interest factors that favour disclosure.
29. The Commissioner is mindful that, in bringing his complaint to the Commissioner's attention, the complainant referred to the Tribunal's stated view in the *Bellamy* decision (*EA/2005/0023*) that:
- "At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest"*.
30. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In his view, 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. In his view, that principle is fundamental to the administration of justice.
31. Although he considers there will always be an initial weighting towards maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is the case here, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the requested advice were disclosed by reference to the following criteria:

- how recent the advice is; and

- whether it is still live.
32. He has also taken into account the significance of the actual information and what it reveals.
  33. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted after taking the advice.
  34. With regard to whether the advice in this case could be considered to be live at the time of the request, the Commissioner notes the stage the Bill had reached on its journey through the Parliamentary process. The Commissioner is satisfied that the advice is live and considers that this factor carries significant weight.
  35. In favour of disclosure the Commissioner acknowledges the generic arguments of accountability, transparency and furthering public debate. He also accepts that there is a clear public interest in disclosure of information which would allow the public to assess the degree to which legislation has been produced on the basis of sound legal advice.
  36. He notes the strength of the views – both for and against - in relation to the subject matter of the Bill. In that respect, and in the context of the information at issue in this case, he is mindful that the Bill has received much media attention. He recognises that matters relating to national security, including the reconciliation of issues of justice and security, are clearly matters that attract the genuine interest of a concerned public.
  37. In reaching a conclusion in this case, the Commissioner is mindful that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
  38. He acknowledges that there is a strong public interest in the legal advice that underlies the publicly stated position on matters of considerable importance and that disclosure of the information in question here would serve that public interest.
  39. In the Commissioner's view, were it the case that no effort had been made to explain the Government's position with respect to various aspects of the Bill, it is possible that the public interest in the information in question might have been sufficient to equal the public interest in the maintenance of LPP.

40. In the event, however, the Commissioner recognises that some action has been taken to satisfy this public interest, while maintaining LPP. In this respect he notes the information publicly available on the Government website. He also notes the Parliamentary process and the opportunity provided within that process for elected representatives to debate the issues surrounding the Bill - including the matter of whether or not proceedings should be heard in private.
41. As a result, the Commissioner has concluded that, in all the circumstances, 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 MoJ is not, therefore, required to disclose the information in question.



## Right of appeal

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42. 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)

43. 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.
44. 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  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**