

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2013

Public Authority: Cabinet Office
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant requested information relating to legislation which requires royal consent. The Cabinet Office withheld the information under section 42(1).
2. The Commissioner's decision is that the Cabinet Office has applied section 42(1) appropriately.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 4 September 2012 the complainant wrote to the Cabinet Office (CO) and requested information in the following terms:

'The Information Commissioner's Decision Notice FS50425063 refers to three pamphlets dated 1 August 2008, 15 November 2010 and December 2011 in the context of procedures for dealing with legislation that might require royal consent. I understand that the December 2011 pamphlet is a revision of the November 2010 pamphlet, but I am not clear on the relationship to the August 2008 pamphlet. Please can I have a complete copy of each of these pamphlets (i.e. everything, not just the information the Commissioner ordered to be disclosed)?'

5. The CO responded on 1 October 2012. It stated that it was appealing the Commissioner's decision notice FS50425063 to the First-tier Tribunal (the tribunal) and was therefore withholding some of the requested information under section 31(1)(c) and some under section 42(1).

6. Following an internal review the CO wrote to the complainant on 5 December 2012. It stated that it was applying section 42(1) to all of the withheld information and was not relying upon section 31(1)(c) any longer. It also apologised for the delay in carrying out the internal review, explaining that it had been waiting for the tribunal to reach its decision regarding the appeal, but this had not yet happened.

Scope of the case

7. The complainant contacted the Commissioner on 6 January 2013 to complain about the way his request for information had been handled. He complained about the CO's application of section 42(1) and that it had not explained in its refusal notice that it was relying upon section 42(1) to withhold all of the information, thereby being in breach of section 17(1). The complainant also complained that the CO took longer than twenty working days to carry out the internal review and did not provide him with a target date for completion.
8. The Commissioner will consider whether the CO has applied section 42(1) to the withheld information appropriately. He will also consider any procedural breaches.

Background

9. The CO dealt with a similar request from a different complainant who requested copies of guidance or criteria in relation to obtaining the consent of the Duchy of Cornwall before bills are passed.
10. In that case, the CO referred the complainant to its publicly available guide to making legislation; it also confirmed that it was withholding its internal guidance under section 42(1) of FOIA.
11. In the present case, the complainant complained to the Commissioner. The CO provided the Commissioner with copies of two internal pamphlets which constituted the withheld information, one dated 1 August 2008 and one dated 15 November 2010 (two of the three requested by the present complainant).
12. In decision notice FS50425063 the Commissioner ordered disclosure of all of the August 2008 pamphlet and paragraphs 1-4, 6, 26, 31-45, 55, 56, 60-61 of the main body of the November 2011 pamphlet and paragraphs 3-7, 16, 21, 22 and 33-35 of the Appendix to that pamphlet. The CO appealed to the tribunal; in its decision dated 12 December 2012 the tribunal ordered that some of the information could be withheld under section 42(1).

Reasons for decision

Section 42

13. Section 42(1) states 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.'

14. Section 42 is a qualified exemption and is therefore subject to the public interest test i.e. information must be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

15. In order to ascertain whether section 42(1) has been applied appropriately, the Commissioner will consider the following two questions:

(i) Is the information covered by LPP?

(ii) In all the circumstances, does the public interest favour maintaining the exception?

Is the information covered by LPP?

16. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege applies where no litigation is in progress or being contemplated but legal advice is needed. In both cases, the communications must be 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 CO argued that the withheld information is exempt under section 42(1) as the information attracts legal advice privilege. It explained that the information in question was provided by Parliamentary Counsel to the government in relation to the drafting and preparation of public bills and that it had been acknowledged that this type of information could fall under section 42(1) in another decision notice – FS50425063 paragraph 22. The CO also explained that this was supported in *Calland v the ICO and the FSA, EA/2007/0136, paragraph 34; Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48, paragraph 41.*

18. Having considered the requested information, the Commissioner is satisfied that it represents communications that, at the time they were made, were confidential. He is also satisfied that the communications were made between a client and professional legal advisers, in this case advice given by Parliamentary Counsel to the government in relation to the drafting and preparation of public bills, acting in its professional capacity and made for the sole or dominant purpose of obtaining legal advice. The Commissioner is therefore satisfied that the withheld information is subject to LPP – in this case legal advice privilege.
19. The Commissioner will now consider the public interest. He will take into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest.
20. The inbuilt public interest in legal professional privilege was noted by the tribunal in *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).

21. However, the Commissioner also notes that 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, treated as an absolute exemption. Therefore, although the inbuilt weight in favour of maintaining the exemption is a weighty factor, the information should be disclosed if the public interest is outweighed by factors favouring disclosure.
22. In addition, the Commissioner notes the recent Tribunal decision in *Keith Gordon v Information Commissioner and the Cabinet Office EA/2012/0115*. Whilst the information in that case was instructions to Parliamentary Counsel for drafting a Bill, the tribunal's analysis on public interest is relevant in this case. In particular the Commissioner accepts the relevance of paragraphs 94-98.

Public interest arguments in favour of disclosing the information

23. The complainant argued that disclosure of the information was necessary in this case. He explained that the information relates to how legislation that affects everyone is drafted. He also argued that section 42(1) did not apply to all of the requested information particularly given

the Commissioner's previous findings about the application of section 42 to other parts of the pamphlets.

24. The CO acknowledged that there was a public interest in disclosing information about the preparation of legislation, in order to demonstrate whether or not decisions made by public authorities have been made for sound reasons and on the basis of good quality.

Public interest arguments in favour of maintaining the exception

25. The CO acknowledged that there is a general public interest in transparency and that openness increases public interest in and engagement with the government; and that better public understanding of government was likely to increase government accountability and improve the quality of government. The CO also acknowledged a public interest in understanding how government drafts legislation and the role of the Queen's and Prince's consent to legislation.
26. However, the CO argued that there is a strong public interest in a person seeking legal advice being able to communicate freely with legal advisers in confidence and being able to receive advice from legal advisers in confidence. The CO explained that this was supported by a House of Lords decision in *Three Rivers DC v Bank of England (No.6) [2004] UKHL 48*.
27. The CO also pointed out that in paragraph 41 of the judgment it stated that legal professional privilege applies to advice given by Parliamentary Counsel to government departments in relation to the drafting and preparation of public Bills.

Balance of the public interest arguments

28. The Commissioner acknowledges that there is a strong public interest in public authorities being accountable and in disclosing information that allows scrutiny of a public authority's decisions. The Commissioner also acknowledges that this would create a degree of accountability and would also enhance the transparency of the process through which such decisions are made.
29. In addition, the Commissioner also considers that the disclosure of the legal advice would provide a degree of transparency and reassurance to interested parties that the CO's actions were in the best interests of the public.
30. The Commissioner has considered all of the withheld information. In line with relevant case law he accords significant weight to the maintenance of legal professional privilege. Whilst he recognises that this exemption should not become, in effect, an absolute exemption, it is the case that

there would need to be very clear, specific public interest grounds for the public interest in the maintenance of legal professional privilege to be overridden.

31. The Commissioner notes that the CO has confirmed that it has disclosed the information to the complainant, apart from what the tribunal ordered should be withheld under section 42 when it was considering the CO's appeal against FS50425063.
32. The Commissioner also notes that the CO has explained that the December 2011 pamphlet is an updated version of the November 2010 pamphlet. He notes that the December 2011 pamphlet was not considered by the tribunal in the related appeal. However, the Commissioner has considered the information the CO has withheld regarding the 2011 pamphlet. He is satisfied that this is the same information that the tribunal found could be withheld from the November 2010 pamphlet.
33. The Commissioner has seen all of the information and is satisfied that the CO has disclosed all of it apart from the information which the tribunal stated could be withheld under section 42(1).
34. Having reviewed the withheld information and taking all the circumstances into account, the Commissioner is satisfied that there are not any sufficiently clear, specific grounds for the public interest in maintaining legal professional privilege to be overridden. He considers that the public interest in maintaining legal professional privilege outweighs the public interest in disclosure of the information.
35. The CO is not required to disclose the withheld information.

Procedural matters

36. The complainant complained that the CO had only applied section 42(1) to all of the information during the internal review so therefore had breached section 17(1).
37. When considering this, the Commissioner noted the comments of the Tribunal in the case of [McIntyre v the Information Commissioner and the Ministry of Defence \(EA/2007/0068\)](#) regarding internal reviews:

'...the Act encourages or rather requires that an internal review must be requested before the Commissioner investigates a complaint under s50. Parliament clearly intended that a public authority should have the opportunity to review its refusal notice and if it got it wrong to be able to correct that decision before a complaint is made...'

38. The Commissioner is satisfied that the CO was entitled to apply section 42(1) to all of the information and has not breached section 17 by doing this in the internal review.

Other matters

39. The complainant complained that the CO took longer than twenty working days to carry out the internal review and did not provide him with a target date for carrying it out.
40. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.
41. As the Commissioner has made clear in his *'Good Practice Guidance No 5'*, he considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
42. The Commissioner notes that it took the CO 46 days to carry out the internal review. However, he considers that in the particular circumstances of this case, it was reasonable as the CO was waiting for the tribunal decision related to this request which would materially affect what information could be disclosed to the complainant. He also notes that the CO explained this to the complainant in its refusal notice and that in the internal review letter, it apologised for the delay, explaining that the tribunal had not considered the appeal but that it felt it could not delay carrying out the internal review any longer.
43. With regard to not providing the complainant with a target date for carrying out the internal review, the complainant pointed out that the section 45 Code of Practice (paragraph 41) required a public authority to do this. However, the Commissioner is satisfied that it was not possible to do this, as the CO was awaiting the outcome of an appeal as explained in paragraph 40.

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

Graham Smith
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