

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 November 2013

**Public Authority:** The Charity Commission  
**Address:** PO Box 1227  
Liverpool  
L69 3UG

#### **Decision (including any steps ordered)**

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1. The complainant has requested information exchanged between the Charity Commission and a third party, and information internal to the Charity Commission regarding the third party generated on specified dates.
2. The Commissioner's decision is that the Charity Commission correctly relied on section 42 not to communicate requested information to the complainant.

#### **Background**

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3. The background to this matter relates to the making of a regulatory scheme for The Recreation Ground, Bath pursuant to the Charities Act 2011. A scheme is a legal document for the administration of a charity. A scheme forms part of the governing document of a charity, the interpretation of which may fall to be determined by the High Court.

#### **Request and response**

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4. On 23 February 2013 the complainant requested, from the Charity Commission ("CC"), information of the following description:
  - Any and all correspondence with attached documents, by email, letter, phone conversation or meeting file notes/minutes between the Charity Commission with the Bath Recreation Ground,

B&NES, Bath Ruby Ltd, Arena 1865 Ltd dated 1 March 2012 to December 31st 2012.

- Additionally any internal memos/internal emails and internal meeting notes within the Charity Commission relating to Bath Recreation Ground March 1st 2012-December 31st December 2012.
5. The CC responded on 26 February 2013 by providing some information within the scope of the request but refused to provide the remainder. The following exemptions were cited as its basis for doing so:
- Section 42 - Legal Professional Privilege
  - Section 43 - Commercial Interests
  - Section 40 – Personal Data
6. The complainant requested an internal review on 27 February 2013. The CC sent her the outcome of its internal review on 27 March 2013. It upheld its original position to withhold information. However, it now also relied on section 41 (confidential information) to withhold the information but no longer section 43.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 4 April 2013 to complain about the way her request for information had been handled.

### **Reasons for decision**

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8. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
- the duty to inform the applicant whether or not requested information is held and, if so,
  - the duty to communicate that information to the applicant.
9. The CC considers that the withheld information is exempt from the duty of communication by virtue of, amongst others, section 42 of the Act. It maintains that the withheld information comprises legal advice which attracts legal advice privilege. It explained that the circumstance in which the advice was requested and given meets the criteria for

protection under section 42 because it came into being for the purpose of seeking legal advice and was delivered by the lawyer confidentially. The legal advice relates to the making of a regulatory scheme for land called The Recreation Ground, Bath.

10. Section 42(1) 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.'

11. Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI EA/2005/0023*) as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation." (paragraph. 9)

12. There are two types of privilege; litigation privilege and legal advice privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In these 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. Communications made between adviser and client in a relevant legal context will attract privilege.

13. The Information Tribunal in the case of *Calland and the Financial Services Authority (EA/2007/0136)* noted that in-house legal advice or communications between in-house lawyers and external solicitors or barristers also attract legal professional privilege.

14. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to 'advice privilege' the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.

15. The Commissioner's view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is capable of attracting legal professional privilege. This is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information.
16. The Commissioner has viewed the withheld information and it comprises a draft order, requests for and advice on the draft order. Accordingly the Commissioner finds that the withheld information attracts legal privilege (advice privilege) and the exemption afforded by section 42(1) is engaged. A small portion of the withheld information does not emanate directly from lawyers. However this information repeats legal advice and consequently it retains legal professional privilege.
17. Section 42 is a qualified exemption so the public interest test set out in section 2(2)(b) must be applied. That is, though the exemption is engaged, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
18. The CC laid out to the Commissioner its consideration of the public interest test. It is paraphrased as follows,

For Disclosure

- There is an inherent public interest in disclosure of information which would promote accountability and transparency by public authorities for decisions taken by them.
- There is also a public interest to disclose information to reassure the public and interested parties that it followed appropriate procedures and were acting as an impartial regulator.

Against Disclosure

- The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice.
- There is a strong interest in allowing clients to seek full and frank advice from their professional advisors in confidence and not be concerned that their discussions might be routinely disclosed under the FOIA or otherwise.
- The release of legal advice provided during the course of its regulatory work could significantly impact upon a case officer's willingness to seek specialist advice and thereby impact on the quality of its decision making.

- Additional weight is attached to the public interest in maintaining the exemption as the advice is recent and live
19. The complainant in her complaint to the Commissioner made the following remarks regarding the public interest test,
- If the legal advice provided indirectly to the CC is correct, robust, and consistent with the resulting Commission scheme which has been published and clearly justifies the benefits to Beneficiaries of all aspects of the scheme then disclosure would not be prejudicial to any party.
  - The fact that the legal advice is current does not favour exemption, but rather, given the timing of the Decision Review and the value of the land at stake, it favours disclosure. An informed group of Beneficiaries can only benefit the Reviewer.
20. The Information Tribunal, in *James Kessler QC v Information Commissioner (EA/2007/0043)*, laid out with clarity (at paragraph 60) the following public interest factors in favour of maintaining the exemption at section 42 FOIA:
- “a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.
- b. Were legal advice disclosed routinely, there would be a disincentive to such advice being sought and/or a disincentive to seeking advice based on full and frank instructions.
- c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between a public authority and its legal advisers.
- d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.
- e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced. Advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed.”

21. Differently constituted Information Tribunals, with one exception, have said that the principle of legal professional privilege diminishes with age. The Commissioner accepts this principle on the basis that if advice has been recently obtained, it is likely to be used in a variety of decision-making processes (i.e. allowing the client to determine a course of action/issue court proceedings/raise challenges through other channels, e.g. ombudsman). The Commissioner recognises that these processes would be likely to be affected by disclosure.
22. However, the older the advice, the more likely it is to have served its purpose and the less likely it is to be used as part of a decision making process. This may mean that any harm to the privilege holder is slight and gives weight to arguments in favour of disclosure. On the facts of this matter though, the information that attracts legal professional privilege had been generated a relatively short time before the information request. Accordingly the "harm" to the privilege holder is not particularly diminished.
23. The Commissioner also accepts that ordering disclosure of the requested information could inhibit the ability of the CC to obtain frank legal advice in the future with confidence that the advice is given without undue consideration of disclosure.
24. The Commissioner is also mindful of the comments of Mr Justice Wyn Williams in the High Court decision of the Department for Business Enterprise and Regulatory Reform and Dermot O'Brien and the Information Commissioner (EWHC 164 (QB)) when he observed that: 'The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight'. (See paragraph 53). In this matter that observation prevails. The public interest in upholding legal professional privilege significantly outweighs the public interest in releasing legally privileged information.
25. Taking into account the circumstances of this case, the Commissioner does not consider the public interest in the maintenance of the exemption to be outweighed. In reaching this conclusion, the Commissioner notes the assertions of the complainant that releasing the information will give succour to the beneficiaries of the regulatory scheme. However the beneficiaries are a relatively small proportion of the public and this fact significantly diminishes this public interest argument for releasing the withheld information.
26. The Commissioner also disavows the complainant's assertion that the "newness" of the legal advice is a factor for releasing the information. The explanation for this is given at paragraph 21 and 22 above.

27. On balance the Commissioner's decision, for the reason given above, is that the public interest test favours the maintenance of the exemption afforded by section 42. That is, the public interest in upholding legal professional privilege significantly outweighs the public interest in releasing the legally privileged information.
28. Having found that the information was properly withheld, by reference to section 42 read together with section 2, the Commissioner did not go on to consider the applicability of the other exemptions relied upon by the CC.

## Right of appeal

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29. 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)

30. 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.
31. 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 .....**

**Alexander Ganotis**  
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