

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2013

Public Authority: Ministry of Defence (MOD)
Address: Main MOD Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested a copy of an opinion by counsel regarding the compatibility of SBA [the Sovereign Base Areas of Cyprus] Courts with ECHR dated 2000/2001 ("the opinion"). MOD refused to disclose the opinion citing the section 42(1) FOIA legal professional privilege exemption as its basis for doing so.
2. The Commissioner decided that MOD had applied the section 42(1) FOIA exemption correctly and that the balance of the public interest favoured maintaining the exemption. He also noted a breach of section 17(3)(c) FOIA for which MOD has apologised. The Commissioner decided that MOD need take no further steps to comply with the legislation.

Request and response

3. On 28 October 2012 the complainant wrote to MOD and requested, among other things, the following information:

a copy of counsel's opinion regarding the compatibility of SBA Courts with ECHR dated 2000/2001.
4. On 26 November 2012 MOD refused to provide a copy of the opinion citing the section 42(1) FOIA exemption as its basis for doing so.
5. Following an internal review MOD wrote to the complainant on 8 February 2013 maintaining its refusal to disclose the opinion.

Scope of the case

6. The complainant contacted the Commissioner on 4 May 2013 to complain about the way his request for information had been handled. He said that, because he was unable to access the information within the opinion, he was unable properly to progress another matter involving MOD; he also considered that, in his view, there existed the possibility of misrepresentation by MOD as to the content of the opinion.
7. The Commissioner has received and reviewed representations from MOD and the complainant. He has reviewed the withheld opinion which was provided to him in confidence by MOD. The Commissioner has also reviewed background correspondence provided by the complainant in support of his own submission. The Commissioner has considered the application of the section 42(1) FOIA exemption (legal professional privilege) and also whether or not the balance of the public interest favours maintaining it.

Reasons for decision

8. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
9. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending; and litigation privilege where litigation is contemplated or pending.
10. In its representations to the Commissioner, MOD relied on advice privilege to withhold the requested information. This privilege attaches to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation.
11. The communication in question needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact which is usually to be found by inspecting the documents themselves.
12. In this matter, the Commissioner has examined the withheld opinion and he is satisfied that its principal purpose was to give advice to MOD and that it therefore merits the protection of legal advice privilege.
13. The complainant told the Commissioner that MOD had instructed counsel to produce the opinion on behalf of the service (military) lawyers who

could not instruct counsel directly. He submitted that accordingly the service (military) lawyers had been the clients for the opinion, not MOD. The Commissioner saw that counsel had been instructed by MOD and had reported to MOD. He therefore decided that MOD had been the client and that it was for MOD, as the commissioner of the opinion, to waive legal privilege or to retain it as MOD saw fit.

14. Information does not attract legal professional privilege if the contents of the legal advice have been disclosed and thus the privilege can be said to have been waived.
15. The Commissioner's approach to waiver cases is that a mere reference to, or a brief summary of, legal advice, even if placed in the public domain, will not amount to waiver. Furthermore, if a very limited disclosure does not reveal the reasoning behind the conclusion or a considered examination of the relevant case law precedent, and the way they apply to the case, then waiver will not have occurred. Ultimately each case needs to be considered on its merits with a careful examination and comparison of both the content of the legal advice and the evidence of waiver.
16. The complainant told the Commissioner that privilege no longer attached to the opinion. The complainant said that, during his period of active service as a MOD lawyer, a brother officer had given him an outline indication of what he had described as the conclusions reached in the opinion. The complainant said that this meant the document had been placed in the public domain. MOD has however confirmed to the Commissioner that the opinion has not been shared in an unrestricted way with members of the public or other third parties and said that, as a consequence, privilege had not been surrendered.
17. The Commissioner has considered the facts of this case and, after taking careful note of the parties' representations, and after viewing the content of the opinion and other relevant correspondence, he decided that MOD had not disclosed the opinion in an unrestricted way and had not waived privilege. He therefore decided that the section 42 FOIA exemption is engaged.

Public interest test

18. Section 42 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, 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

19. There is an inherent public interest in disclosure of information to ensure that public authorities are accountable for, and transparent about, decisions that they have taken and the furtherance of public debate. It is also in the public interest to further public understanding of governmental decision making. Disclosure of the opinion could contribute to an enhanced public understanding of the judicial process within the Cyprus SBA.
20. The complainant said that the opinion was relevant to a question which concerned him as to whether the SBA judicial process was compliant with Articles 5 and 6 of the European Convention on Human Rights (ECHR). There was, he said, the 'potential for fraud' without disclosure and for the public to be misled as to the compliance of the SBA judicial system with the ECHR. He said that it seemed remarkable that MOD would tell its own personnel that the SBA judicial process was compliant with the ECHR but would not disclose to him the opinion confirming that.
21. The complainant also told the Commissioner that he should be able to access the opinion as a matter of equity. He wished to see the opinion to consider if it might assist him in preparing for a separate but related MOD matter which he was progressing in another place. The Commissioner regarded this as the complainant's private matter being pursued in another place with its own disclosure rules. The Commissioner regarded this as a private interest that was not relevant to the public interest in this FOIA matter.

Public interest arguments in favour of maintaining the exemption

22. MOD provided the Commissioner with submissions supporting its position that the public interest favoured maintaining the exemption.
23. MOD said that it is strongly in the public interest that a person or organisation is able to communicate freely with their legal advisers and also that advice is provided in confidence. Safeguarding this is a fundamental principle of English law. Non-disclosure of information covered by legal privilege encourages clients to seek legal advice in order to properly arrange their affairs and promotes full and frank exchanges between clients and legal advisers. There is therefore a strong inherent and inbuilt public interest in protecting privileged information of that nature which must be taken into account when balancing the public interest test under section 42(1).

Balance of the public interest arguments

24. In considering the balance of the public interest under section 42 FOIA, the Commissioner accepts that there is a strong element of public interest built into legal professional privilege. The Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) was clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption' (para 41).

25. Although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are some limited circumstances where the public interest will favour disclosing the information.
26. Having considered carefully the representations from the parties and the content of the withheld information, the Commissioner decided that there was no strong public interest in disclosure sufficient to match the public interest in maintaining the legal professional privilege exemption in this case.

Other matters

27. On 8 February 2013 MOD acknowledged to the complainant that it had breached section 17(3)(b) FOIA in not explaining its reasoning when conducting its initial public interest test, an oversight for which MOD has apologised.

Right of appeal

28. 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

29. 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.
30. 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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SK9 5AF