

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 April 2014

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

#### Decision (including any steps ordered)

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1. The complainant has requested legal advice concerning Abu Qatada's deportation.
2. The Commissioner's decision is that the Home Office has applied section 42(1) of FOIA appropriately.
3. The Commissioner does not require the Home Office to take any further steps.

#### Request and response

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4. On 24 July 2013 the complainant wrote to the Home Office (HO) and requested information in the following terms:  
*'Copies of all records of legal advice held concerning the deadline for the lodging of a referral request to the Grand Chamber in the Abu Qatada case.'*
5. The HO responded on 21 August 2013. It confirmed that it held the requested information, but was withholding it under section 42(1).
6. On 2 September 2013, the complainant requested an internal review.
7. On 30 September 2013 the HO wrote to the complainant, confirming that it had carried out an internal review. It upheld its application of section 42(1).

8. The complainant contacted the Commissioner on 25 October 2013 to complain about the way his request for information had been handled.
9. The Commissioner will consider whether the HO applied section 42(1) appropriately.

## **Background**

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10. The case of Abu Qatada was high profile for several years. The specific question of the exact deadline for lodging an appeal with the Grand Chamber of the European Court was a crucial matter. During the three-month period when an appeal could have been submitted to the Grand Chamber, a legal order known as Rule 39<sup>1</sup> was in place, preventing the Government from deporting Abu Qatada.
11. Abu Qatada lodged an appeal on 17 April 2013 after the Home Secretary, Theresa May, had reactivated deportation proceedings against him. The Home Secretary believed that the deadline for an appeal, together with the Rule 39 order, had expired on 16 April 2013.
12. However, on 9 May 2013 a European Court panel considered whether the appeal should be heard. It concluded that the deadline for an appeal was 17 April 2013; therefore the appeal had been lodged within the deadline.

## **Reasons for decision**

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13. Section 42 of FOIA 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'.*

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<sup>1</sup> If someone is facing removal/deportation/extradition and removal directions have been set, all legal avenues in the UK have been exhausted and the person has strong grounds as to why the removal/deportation/extradition should not take place, they can make an emergency application to the ECHR under Rule 39 'Interim Relief', to have the removal stayed.

14. 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.
15. The HO explained to the Commissioner that it was relying upon advice privilege. Advice privilege attaches to communications between a client and its legal advisers and any document which evidences the substance of such a communication, where there is no pending or contemplated litigation.
16. 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.
17. The Commissioner has examined the withheld advice and is satisfied that it covers confidential communications between a legal adviser and client, made for the dominant purpose of seeking or giving legal advice. Its dominant purpose was to give advice to the HO and it therefore attracts legal advice privilege.
18. However, information does not attract legal professional privilege if the contents of the legal advice have been disclosed; the privilege would have been waived.
19. The Commissioner's approach to waiver cases is that a 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.
20. The HO explained that the Home Secretary had updated Parliament and the public, giving an accurate representation of the legal advice she had been given, where appropriate. The Commissioner does not consider that the detail of the legal advice, as set out in the withheld advice, was divulged.
21. The Commissioner has considered the facts of this case. He is satisfied that the HO has not disclosed the advice in an unrestricted way and has not waived privilege. He therefore considers that the section 42(1) FOIA exemption is engaged.

### **Public interest test**

22. Section 42(1) FOIA is a qualified exemption, 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***

23. There is an inherent public interest in disclosure of official information. This is to ensure that public authorities are accountable for and transparent about, decisions that they have taken. It also enables public debate and can enhance public understanding of governmental decision making. Disclosure of legal advice given to the government could also contribute to a better informed debate of the issues of the day.
24. The complainant argued that it was not clear why there was a difference of view or interpretation between the European Court and the Government. In addition, the complainant argued that this had never been satisfactorily resolved. Furthermore, the complainant pointed out that it took almost ten years to deport Abu Qatada and it was still not clear why his deportation was delayed last year.

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

25. There are important public interest arguments in favour of maintaining the exemption. The HO explained that there is a strong public interest in protecting the confidentiality of communications between lawyers and their clients. It promotes the rule of law by encouraging proper legal advice to be sought and to allow full and frank exchange of views between legal advisers and their clients.
26. The HO also explained that Abu Qatada was deported on 7 July 2013 and there is no ongoing litigation (or any associated public expenditure) relating to his deportation. However, at the time of his deportation, Abu Qatada still had the right of appeal from 28 days after his deportation on 7 July 2013. The HO pointed out that in these circumstances, litigation privilege could also apply. It also argued that there is no longer the intense public interest and debate over Abu Qatada's case and, specifically, over the deadline for appealing to the Grand Chamber, that there once was.
27. Furthermore, the HO pointed to the Information Tribunal's decision in *Bellamy and Secretary of State for Trade and Industry (EA/2005/0023)* which found that:

*" ... 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 free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cases ...” (paragraph 35).*

28. The HO argued that disclosure of the legal advice would undermine its ability to seek such advice in the future, thereby damaging the ability to formulate and deliver policy on a sound legal basis.

***Balance of the public interest***

29. The Commissioner recognises that regarding the deadline for applying to the Grand Chamber in Abu Qatada’s case, there is a public interest in understanding why there was a difference regarding when the deadline was. However, he also notes that the Home Secretary explained that she was acting on legal advice and kept both Parliament and the public regularly updated.
30. As regards maintaining the exemption, the Commissioner recognises that the general public interest inherent in this exemption will always be strong. This is because of the importance of the principle of safeguarding openness in communications between a legal adviser and client, to ensure that there can be access to full and frank legal advice. In turn, this is fundamental to the administration of justice. This has been recognised in a succession of Information Tribunal decisions, including *Bellamy and Secretary of State for Trade and Industry (EA/2005/0023)* (as discussed in paragraph 27).
31. The Commissioner has considered the arguments put forward by both parties. He acknowledges the weight of arguments for disclosure. However, he considers that the balance of public interest favours maintaining the exemption.

## Right of appeal

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32. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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**