

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 May 2014

Public Authority: Police and Crime Commissioner for West Yorkshire

Address: Ploughland House
52 George Street
Wakefield
WF1 1DL

Decision (including any steps ordered)

1. The complainant requested information relating to payments provided to a former Chief Constable of West Yorkshire Police. The Office of the Police and Crime Commissioner for West Yorkshire (the PCC) provided some information but refused to disclose the remainder citing sections 40 (personal information) and 42(1) (legal professional privilege) of FOIA.
2. The complainant accepted that any personal information is exempt from disclosure. The Commissioner has investigated the PCC's application of section 42 to a document which reflected counsel's advice to the then West Yorkshire Police Authority.
3. The Commissioner's decision is that the PCC correctly applied the section 42 exemption. He requires no steps to be taken.

Request and response

4. On 29 November 2013 the complainant wrote to the Police and Crime Commissioner for West Yorkshire and requested information of the following description:

"Please provide the information held relating to any inquiries carried out by the auditor KPMG in connection with the lawfulness or otherwise of payments provided to former chief constable Norman Bettison.

This would include all communications between the PCC's office and KPMG on this issue".

5. The PCC responded on 23 December 2013. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
 - section 40 personal information; and
 - section 42(1) legal professional privilege.
6. The complainant requested an internal review on 7 January 2014, saying:

"I accept the redactions of contact details but section 42 is contested.

Specifically, it is submitted the public interest balance hasn't been correctly calibrated and in this particular case the circumstances weigh heavily in favour of disclosure".
7. The PCC sent him the outcome of its internal review on 6 February 2014, upholding its original position.

Scope of the case

8. The complainant contacted the Commissioner on 14 February 2014 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be the PCC's application of section 42(1) to the information withheld by virtue of that exemption. That information comprises legal advice obtained by the then West Yorkshire Police Authority.

Reasons for decision

Section 42 legal professional privilege

10. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
11. On 23 December 2013, in its correspondence with the complainant, the PCC told him that the section 42 exemption:

"has been applied to counsel's opinion – a document which is attached to an email which is included in this disclosure".

12. In subsequent correspondence it confirmed that the section 42 exemption was applied:

"to a document which reflected counsel's advice to the West Yorkshire Police Authority".

13. The withheld information relates to advice provided to the then West Yorkshire Police Authority by Counsel about a locally agreed employment package for the then Chief Constable. The advice was received in 2007.

14. The parties do not dispute that section 42 is engaged. Having considered the withheld information, a copy of which was provided to the Commissioner during the course of his investigation, the Commissioner is also satisfied it falls within the definition of LPP. He has reached this conclusion on the basis that it relates to correspondence between the client and lawyer made for the dominant purpose of giving legal advice.

15. It follows that he considers that the information at issue engages section 42(1).

The public interest test

16. Section 42(1) of FOIA is a qualified exemption and the Commissioner must therefore 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

17. The complainant put forward comprehensive arguments in favour of disclosing the requested information. For example, he told the PCC:

"The advice is more than six years old and relates to a decision to provide more than £250,000 'extra' to a chief constable in payments, the kind of which are now being withdrawn in other force areas as their lawfulness is either called into question or ruled unlawful.

It is very much in the public interest that WYPCC is fully transparent about the legal advice its predecessor, WY Police Authority, received at the time.

In terms of the decision, it was made at private meetings with no details of the package or why it was considered lawful provided to the public.

Further, a resolution that the chairman of the former police authority would seek approval from the Home Secretary was not acted upon.

The decision to make the payments has been made and the legal advice is not 'live'. The chief constable has left the force".

18. The PCC acknowledged the passage of time since the advice was given, along with:

"the strong public interest in the decisions taken by public bodies and in ensuring that these are properly considered and professionally conducted".

19. It also recognised:

"the overriding public interest in transparency in decision making, and, in particular, transparency in those decisions which involve public expenditure".

Public interest arguments in favour of maintaining the exemption

20. During the course of his investigation, the Commissioner invited the PCC to provide further explanation as to why it considers that the public interest in maintaining the exemption outweighs the public interest in disclosure. The PCC responded, confirming that it was relying on the arguments provided to the complainant.

21. In favour of maintaining the exemption the PCC told the complainant it had taken into consideration:

"the public interest in ensuring that public authorities continue to have access to independent, professional and impartial advice which is not compromised or adversely influenced by public disclosure".

22. It also told him it had taken into account:

"the importance of the principle that communications between lawyer and client are protected to ensure access to full and frank advice".

23. With respect to the information at issue having been received in 2007, the PCC acknowledged the complainant's argument about the age of the advice. However, it said:

"the advice, although six years old, is still being relied on and is, therefore, still live".

24. In that respect, the PCC told both the complainant and the Commissioner:

"Although Sir Norman Bettison has left the police service, the continuing public interest in payments to chief officers both in West Yorkshire and elsewhere mean that there remains a potential for further action".

25. It also acknowledged that the individual who is the subject of the request is, for other reasons, likely to remain in the public eye for some time.
26. Furthermore, it confirmed that in assessing the public interest it considered it an important point that the legal advice had been followed. It told the complainant:

"This was considered an important factor since public interest in disclosure would have been greater if the Police Authority was found to have acted against legal advice in this matter".

27. Recognising that the amount of money involved can be a relevant factor when considering the public interest, the PCC concluded in this case that although:

"the amount of money involved is not insignificant at an individual level, at an organisational level and in view of the budget of West Yorkshire Police over the period in question the amount is not significant enough to warrant waiving professional privilege and the subsequent potential prejudice to any further action on the part of the Police and Crime Commissioner".

Balance of the public interest

28. In considering the balance of the public interest, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. However, he does not accept that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.
29. The Commissioner considers that there is a strong public interest in promoting openness, transparency and accountability in a public authority's decision making processes. In this particular case, disclosure

of the legal advice would provide a greater degree of transparency in relation to a decision involving public expenditure.

30. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. 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 any future decision making process.
31. 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 on that basis.
32. Although the withheld information is now several years old – having been received in 2007 - that does not mean that the issue is not still topical. In this case, despite the passage of time, the Commissioner accepts that the advice was still being relied on and thus could still be considered to be live at the time of the request. In the Commissioner's view this adds weight to the arguments in favour of withholding the information.
33. In light of the above, the Commissioner has concluded that, in all the circumstances of this case, 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 PCC is not therefore required to disclose the information in question.

Right of appeal

34. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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
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