

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **8 October 2014**

Public Authority: **University of Oxford**
Address: **University Offices**
Wellington Square
Oxford
OX1 2JD

Decision (including any steps ordered)

1. The complainant has requested information from the University of Oxford ("the University") consisting of details in relation to the recovery of sums due in respect of legal billing invoices submitted by the University's legal advisors and in respect of which there had been a Conditional Fee Arrangement ("CFA") between the University and its legal advisors. The University provided some information to the complainant which was within the scope of the request, but withheld the remaining information relying upon section 42(1) of the FOIA.
2. The Commissioner's decision is that the University has correctly applied section 42 of the FOIA in this case. He therefore requires no steps to be taken.

Background

3. The complainant has commenced a series of legal proceedings against the University in relation to employment issues. Following the completion of the proceedings in respect of one of these matters, the issue of costs recoverable as against the complainant has had to be determined.

Request and Response

4. On 5 September 2013 the complainant submitted a request for information to the University. The wording of this request can be found in Appendix A.

5. On 13 November 2013 the University provided its response. It advised that it had already provided some of the information requested in response to FOIA requests from the complainant dated 22 March 2013 and 21 June 2013. It provided some additional information consisting of a corrected bill of costs and detailed witness statement in relation to the proceedings which had been concluded. These set out a detailed account of the University's position on costs.
6. The University also sought to rely upon section 42 of the FOIA which provides for an exemption in respect of information which is considered to come within the scope of Legal Professional Privilege. ("LPP")

Scope of the case

7. The complainant contacted the Commissioner on 18 December 2013 to advise that she was not satisfied with the response received to the request on the basis that the use of LPP was not warranted.
8. During the Commissioner's investigation the University has released more information to the complainant to the extent that the only issues now remaining within the scope of the complaint are requests 1(c) and (d).
9. During the course of the investigations the complainant has stated that she believes that further information is held by the University in relation to communications between the University and its previous legal advisors concerning the recovery of sums paid out in respect of an unenforceable CFA.
10. The University has advised that no further information is held other than that upon which it relies upon section 42 as a basis for not disclosing information and also section 21 of the FOIA which provides for an exemption in relation to disclosure where the information is reasonably accessible by other means.
11. Therefore the scope of this matter has been to consider whether further information is held in respect of this request in so far as it relates to requests 1(c) and (d); whether the University was correct in relying upon section 42 of the FOIA as a basis for refusing to provide the requested information; whether, in all the circumstances of this case, the public interest favours maintaining the exemption in so far as it relates to section 42; and the application of section 21.

Reasons for decision

Section 1

12. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled: –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

13. In situations where there is a dispute between a public authority and a complainant about whether the requested information is held, the Commissioner applies the civil standard of the balance of probabilities. The Commissioner must therefore decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.

14. The information requested in this matter consists of information relating to costs recoverable in respect of an invoice which also dealt with matters under a CFA which was subsequently found to be unenforceable. This included advice sought and given in relation to a potential claim by the University against its former legal advisors in relation to this arrangement.

15. The University advised and the Commissioner has seen evidence that the University first became aware of the potential unenforceability of this arrangement with its previous legal advisors when the complainant's own solicitors raised this issue with the University's previous solicitors. The issue arose because of responses given by the University in relation to previous FOIA requests which do not fall within the scope of this decision notice.

16. From the documents produced, the Commissioner notes that at the time of the information request the University was engaged in ongoing litigation with the complainant relating to the payment of costs incurred in employment tribunal proceedings which had been concluded and which the complainant had been ordered to pay by the court.

17. The University has advised that all information that it holds in respect of request 1(c) and (d) has involved its legal advisors and consists of the following:

- communications between the complainant's solicitors and those acting for the University relating to the University's efforts to recover the costs paid in invoice 1159409;
 - documents submitted to the Court by the University for the purpose of recovering the costs paid in invoice 1159409;
 - communications between the University as client and its legal advisors (either previous or current) relating to advice or proceedings in connection with the University's efforts to recover the costs paid in invoice 1159409; and
 - internal communications between solicitors (either previous or existing) relating to advice or proceedings in connection with the University's efforts to recover the costs paid in invoice 1159409.
18. The University has confirmed that the issue in relation to the enforceability of the CFA arose because of communications from the complainant's own solicitors and the view taken that the liability for costs by the complainant should be restricted to that part of the fee arrangement which was enforceable.
19. The University has argued that all communications regarding the recovery of costs in relation to where the CFA was accepted as unenforceable have involved solicitors because of the very technical nature of the issue. Further, that the issue arose as a result of communications between solicitors and all subsequent communications about the issue of recovery or otherwise of sums due in respect of this invoice have been between the University and its legal advisors.
20. The complainant maintains that she believes that there must have been some communication between the University and its previous solicitors concerning the recovery of sums under invoice 1159409 including amounts paid out prior to the unenforceability of the conditional fee arrangement coming to light. She argues that any such correspondence between the University and its previous solicitors on the matter and details of any payments made by the previous solicitors to the University by way of reimbursement could not be legally privileged. Further that information is likely to exist which confirms the efforts or otherwise to recover the sums due.
21. The University has advised the Commissioner that, in spite of the unenforceability of part of the CFA, it was entitled to recover part of the costs incurred from the complainant in accordance with an order of the court. This it did resulting in the courts determination on the issue in June 2014 which found in favour of the University. All information in

relation to the recovery of sums due in respect of the invoice involved the solicitors.

22. The University further advised that no attempt has been made to recover any part of invoice 1159409 except from the complainant herself and that this information is evident from inter-parties correspondence or from documents submitted to the court.
23. The Commissioner has taken into account the explanations provided by the University as to the nature of the subject matter itself, the fact that the issue of the unenforceability of the CFA was raised by the complainant's own solicitors and the University instructed other solicitors to deal with the issue of the recovery of costs in relation to this invoice. In addition the issue of costs in relation to this invoice has been determined whilst the Commissioner's enquiries have been ongoing and the complainant has had access to all documents in those proceedings.
24. He also notes that the University has advised that no attempt has been made to recover any part of the invoice other than from the complainant and therefore it does not hold any information in relation to the recovery of this sum from the previous advisors.
25. Having taken these matters into account the Commissioner considers that on the balance of probabilities no further information is held.

Section 21

26. Section 21 provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
27. In relation to request 1(c) the University has argued that information relating to the University's recovery of the sums paid in invoice 1159409 has already been provided to the Court as a result of the costs proceedings and the complainant was a party to these proceedings. Accordingly it maintains that the complainant has already had access to this information as a consequence of these proceedings.
28. Having considered the above the Commissioner considers that in relation to request 1(c) the information is reasonably accessible to the complainant by other means by virtue of the fact that she was a party to the proceedings in which the issue of her liability for some of the costs incurred in respect of this invoice was considered.

Section 42

29. 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."

30. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal¹ 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)

31. 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.

32. 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.

33. When considering LPP it must be clear as to who the "client" is and who the "legal advisor" is. From the information provided to the Commissioner in the course of his investigations it is apparent that the University is the client and legal advice has been sought and obtained from a firm of Solicitors who provide legal advice when required to do so.

34. In its response to the Commissioner the University has detailed the history and ongoing litigation between the complainant and the

¹ Bellamy v the Information Commissioner and the DTI EA/2005/0023

University in relation to the amount the complainant was required to pay the University by way of costs. This was in respect of an employment tribunal case which had been concluded. The Commissioner notes that the original employment tribunal action commenced in December 2008 with the costs hearing in respect of this concluding in June 2014.

35. The original FOIA request covered information about the costs incurred by the University in proceedings involving the complainant including details as to the bill of costs including the sums paid to its solicitors and the narrative of the work undertaken.
36. The Commissioner has viewed the background documentation produced by the solicitors for the costs proceedings which set out the background of dispute between the parties and the details submitted to court in relation to the issue of costs in relation to invoice 1159409.
37. In relation to this information the Commissioner has concluded that information relating to an invoice which is the subject of legal proceedings itself and the attempted recovery of sums due is information falling within the definition of "communications between lawyer and client". The issue is whether the information would attract legal privilege and was produced in anticipation of potential or actual legal proceedings.
38. In this instance the information in question concerns the costs incurred by the University in relation to a dispute it had with the complainant and whether the University has sought to recover any of these costs.
39. From the evidence produced it is clear that the issue of costs owed by the complainant was still ongoing at the time of the request although it has been determined by the Court during the Commissioners enquiries.
40. The complainant has maintained that information relating to the attempts or otherwise by the University to recover sums due from its previous legal advisor are of concern to her. She has argued that any letters sent to the former solicitors seeking recovery of sums paid out already under the invoice do not attract LPP as they are not communications between solicitor and client concerning advice or in contemplation of litigation.
41. The University has advised that it has only sought to recover costs from the complainant herself and that any communications that may or may not have been held between itself and its legal advisors about the attempted recovery or otherwise of amounts due from others under invoice 1159409 are LPP.
42. The Commissioner has considered the arguments of both parties in this matter and is satisfied that the University could be reasonably expected

not to disclose any communications with its solicitors as to any advice potentially sought or received and any litigation contemplated or initiated.

43. Therefore the Commissioner is satisfied that section 42 exemption is engaged.

Public interest test

44. The exemption given at section 42 is a qualified exemption. This means that even where the exemption is engaged, information is only exempt from release if the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

Public interest in favour of disclosing the requested information

45. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in decisions made by public bodies. This argument is stronger if information is already in the public domain and particularly if there are issues about the advice given, allegations of misrepresentation or the issue of litigation is not a "live" one.
46. However the general public interest in maintaining the exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

Complainant's arguments in favour of disclosure

47. The complainant has argued that there is a real concern about the transparency of contracts for the provision of legal services to the University particularly as sums were paid to legal advisors who relied upon a conditional fee arrangement which was subsequently found to be unenforceable.
48. The complainant has argued that she believes it is in the public interest to know whether the University is taking steps to recover the amounts due from the previous solicitors particularly given the fact she herself was pursued for amounts owed.

Public interest arguments in favour of maintaining the exemption

49. The University has argued that the general public interest in the exemption will always be strong due to the importance of the principle

behind LPP. In relation to any legal advice requested and received it maintains that such were solicitor/client communications.

50. It has stated that in this case the issue of recovery or otherwise of sums due concerned the complainant herself who had been involved in protracted litigation with the University and would not be of any particular interest to the wider public.

Balancing the public interest arguments

51. In reaching a view on this the Commissioner has had to bear in mind that the FOIA is applicant blind, except in a few limited scenarios none of which are applicable in this case. In other words, the potential disclosure of information under the FOIA has to be considered as a potential disclosure to the world at large.
52. Factors which may be relevant in balancing public interest arguments may include whether a large number of people are affected, lack of transparency in the public authority's actions and misrepresentation of any advice given.
53. In these circumstances the issue relates to the attempted recovery or otherwise of amounts due under an invoice. The issue of costs has already been subject to scrutiny by the court.
54. In this particular case the Commissioner is of the view that the general public interest in maintaining the exemption remains paramount due to the importance of the principle behind LPP and the fact that the court has already looked at the issue of these costs.
55. From the information provided it is clear that the complainant remains dissatisfied with the outcome of the proceedings and disputed the amounts payable under the invoice. The Court concluded otherwise. The issue of the recoverability or otherwise of the remaining amount under the invoice from the University's previous legal advisors is a matter the University has instructed its present solicitors upon.
56. As part of the investigations it has advised that it has only sought to recover the sums due from the complainant. These do not include the sums under the CFA. The Commissioner has already concluded that, on the balance of probabilities, it is unlikely further information is held by the University in relation to the issue of recovery of sums from former legal advisors as the University itself has stated that it has only sought to recover costs from the complainant.
57. The Commissioner is of the view that, in the case, safeguarding openness in all communications between client and lawyer is essential to ensure access to full and frank legal advice. Further that the public

interest in maintaining the exemption outweighs the public interest in disclosing the information requested in these particular circumstances as the circumstances have already been considered by the Court and the interest in this matter is of individual concern to the complainant.

58. The Commissioner therefore considers that the University has acted appropriately in relying upon section 42 of the FOIA and that the public interest favours the maintenance of the exemption in this case. He requires no further action to be taken.

Right of appeal

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Appendix A

Request dated 5 September 2013

"Request 1

I have been advised by the University through its lawyers that the retainer between [Name redacted] and the University relating to my first claim was an unlawful conditional fee arrangement and that under this arrangement (invoice 1159409 dated 26.07.10 and settled 25.08.10) the University made a payment of £80,428.75 ([Name redacted] was paid £50,000 + VAT in respect of their own fees and £18,450 + VAT were paid in disbursements).

Request 1(b)

Please give the dates when the University was first informed that the CFA was potentially unlawful and when it was advised that this was indeed the case.

Request 1(c)

Please supply all the information including dates relating to the university's recovery (whether attempted/un-attempted, successful/unsuccessful) of the sums paid in invoice 1159409 (£50,000 + VAT payment to [Name redacted] or the £18,450 + VAT) (any steps taken, discussions, evidence of repayment etc.)

Request 1 (d)

If the University has not attempted to recover any part of the invoice 1159409, please supply all the information recorded in relation to the matter and state why no such payment has been recovered.

Request 3

I understand from the letter that [Name redacted] has issued the University with a number of composite invoices relating to a large amount of work conducted in relation to multiple matters and that some, but not all of these invoices (i) relate to work conducted in connection with my claims or (ii) are drawn up in terms which relate to me or my claims. The letter indicates that invoice totals do not relate solely to my claims.

The following requests are limited to the period of February 2009 to September 2010).

Request 3(a)

Please supply the dates of all composite invoices submitted by or on behalf of [Name redacted] to the University which included work undertaken in relation to the subject matter of my claims.

Request 3(b)

In the case of each invoice, please confirm the names of the billing parties (e.g. [Name redacted] and Oxford University; [Name redacted] and Oxford University) so that it is clear in each case who was the receiving party and who was responsible for the payment.

Request 3(c)

In the case of each invoice please confirm whether the itemised sum(s) relate(s) to work conducted in connection with the subject matter of my claims, as opposed to other matters, and provide details of these itemised sums.

Request 3(d)

I understand from the letter that invoices issued by or on behalf of [Name redacted] include a summary bill narrative. In the case of each invoice, please confirm whether the bill narrative makes reference to me or matters related to me (grievance, claims etc.), in which case please supply details of the general nature of the work undertaken. For instance, the narrative may indicate whether the work related to my grievance or to my ET claim.

To the extent that any of the information falling within the scope of requests 3(c)

Or 3(d) is considered to constitute my personal data, my entitlement to this information should be considered under s7 of the Data Protection Act. Please let me know if you require payment of the statutory fee in relation to the disclosure on my personal data.

Request 4

Please state the total global value of all invoices between the University and (a) [Name redacted] and (b) [Name redacted] during the relevant period, regardless of whether the work relates to my claims. Disclosing such composite information could not give rise to any possible competitive disadvantage as I am not requesting any details concerning the volume of work or charge out rates."