Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 April 2015

Public Authority: The Cabinet Office
Address: 70 Whitehall
London SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested correspondence and other information connected with the drafting of legislation whereby the Duchy of Cornwall is not criminally liable under the provisions of the Data Protection Act 1998. The Cabinet Office refused to provide this citing section 35 (government policy exemption) and section 42 (legal professional privilege exemption) as its basis for doing so. It upheld this position at internal review.

2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 42 as its basis for withholding the requested information.

3. No steps are required.

Request and response

4. On 28 June 2014, the complainant requested information of the following description under the FOIA:

"**Data Protection Act 1998 (DPA)**

…

By section 63 of the DPA, inter alia contravention of the Act by the Duchy of Cornwall does not make the Duchy criminally liable.

Please provide copies of any memos, file notes correspondence associated with the drafting of the provisions of the sections of the Act referred to above which exempted the Duchy from criminal liability."

5. On 28 July 2014 the Cabinet Office wrote to explain that, by virtue of section 10(3), it needed further time to consider the balance of the public interest in relation to section 35(1)(a). It undertook to provide its full response by 25 August 2014.

6. It responded on 4 August 2014.

7. It refused to provide the requested information. It cited the following FOIA exemptions as its basis for doing so:

   - section 35(1)(a) (Formulation/development of government policy)

   - section 42(1) (Legal professional privilege)

8. It argued that the public interest favoured maintaining both exemptions although its arguments appeared to focus almost entirely on section 42(1).

9. The complainant requested an internal review on 5 August 2014 (although the letter was dated 17 July 2014). The Cabinet Office sent the outcome of its internal review to the complainant on 26 August 2014. It upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 26 August 2014 to complain about the way his request for information had been handled.

11. The scope of the complaint was whether the Cabinet Office is entitled to rely on section 35(1)(a) and section 42(1) as its basis for withholding the requested information.

Reasons for decision

12. The Cabinet Office explained that the principal exemption it was seeking to rely on was section 42.

13. Section 42(1) 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.'

14. The Commissioner has dealt with this exemption first because it has been applied to all of the withheld information.

15. Section 42 is a qualified exemption and is therefore subject to the public interest test i.e. information must be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

16. In order to ascertain whether section 42(1) has been applied appropriately, the Commissioner has considered the following two questions:

    (i) Is the information covered by legal professional privilege?

    (ii) In all the circumstances, does the public interest favour maintaining the exemption?

Does the information attract legal professional privilege?

17. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege applies where no litigation is in progress or being contemplated but legal advice is needed. In both 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.

18. The Cabinet Office argued that the withheld information is exempt under section 42(1) as the information attracts legal advice privilege. It explained that the information was created in the process of preparing legislation. It cited Keith Gordon vs the Information Commissioner and the Cabinet Office EA/2012/0115 (the "Gordon case") at paragraph 95 in support of its position as well as other sources (see Note 1). [1] [2] [3]

[1] http://www.informationtribunal.gov.uk/DBFiles/Decision/i918/EA-2012-0115_2012-12-07.pdf

[2] http://www.bailii.org/uk/cases/UKHL/2004/48.html (paragraphs 41)

[3] https://ico.org.uk/media/action-weve-taken/decision-notices/2012/783806/fs_50454918.pdf (paragraph 9)

19. It also explained that the information had not been made available to the public or any third party without restriction. Privilege had therefore not been waived in respect of this information. It said:

    "The withheld information has not been made available to the public or to any third party without restriction and we are therefore satisfied that advice privilege has not been waived in relation to it. The communications comprised in the withheld information took place on the understanding that the information would be likely to remain confidential until it becomes a historical record, and nothing has been done to undermine the privileged status of that information."

20. Finally, it made specific reference to elements of the withheld information in support of its position.

21. Having considered the requested information, the Commissioner is satisfied that the withheld information is subject to legal professional privilege – in this case, legal advice privilege. The dominant purpose of the information is to seek or to provide legal advice. It is communications between a client and their legal advisor acting in a professional capacity.

22. In light of the above, the Commissioner is satisfied that the information is exempt under section 42(1).

The public interest test

23. The Commissioner has therefore considered the public interest. He has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest.

24. The inbuilt public interest in legal professional privilege was noted by the tribunal in *Bellamy and Secretary of State for Trade and Industry v Information Commissioner* (EA/2005/0023) at paragraph 25:

    "… 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 a free exchange of views as to

their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case …".[4]

25. However, the Commissioner also notes that in *DBERR v Dermod O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, treated as an absolute exemption.[5] Therefore, although the inbuilt weight in favour of maintaining the exemption is a weighty factor, the information should be disclosed if the public interest is outweighed by factors favouring disclosure.

Public interest arguments in favour of disclosing the information

The complainant's arguments

26. The complainant has drawn attention to the number of pieces of legislation which included, in effect, immunity from prosecution for the Duchy of Cornwall. He submitted to the Commissioner an abstract he had written in another context which queries whether the Duchy of Cornwall is entitled to Crown Immunity. The abstract made detailed reference to precedents and other sources which challenge the concept that the Duchy is entitled to Crown Immunity. He asserts that there is no specific grant by the Sovereign of Crown Immunity to the Duchy of Cornwall nor is there an Act of Parliament which enacts this concept.

27. He also queried whether specific and bespoke legal advice would be sought for each item of legislation as opposed to reliance on a standard piece of advice.

The Cabinet Office's arguments

28. The Cabinet Office acknowledged that there was a public interest in the disclosure of information about the preparation of legislation, in order to demonstrate whether or not decisions made by public authorities have been made for sound reasons and on the basis of good quality legal advice.

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[4] http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

[5] http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html

Public interest arguments in favour of maintaining the exemption

29. For obvious reasons, the complainant did not submit, nor did the Commissioner seek from him, arguments as to the public interest in maintaining the exemption.

The Cabinet Office's arguments

30. The Cabinet Office drew the Commissioner's attention to paragraphs 94 to 98 of the Tribunal's judgment in the Gordon case (see Note 1) and asserted that they were applicable to this case.

31. It picked out the following specific points in favour of maintaining the exemption:

- There is a very strong public interest in a person being able to communicate freely and in confidence with their legal advisers when seeking legal advice.
- There was a clear and legitimate expectation of confidentiality in the circumstances in which legal advice was obtained in this case.
- There is a public interest in ensuring that there is an effective legislative drafting process which relies on confidentiality of communications.
- Disclosure would have a detrimental effect on the process of preparing legislation in the future because it would inhibit the candour of future communications.
- The advice remains relevant (and will do so for some time) because it may inform the preparation of legislation where similar issues arise in the future.
- The views of lawyers exchanged on the preparation of a piece of legislation cannot be regarded as a "legitimate aid to the construction of that legislation". In support of this point it cited Lord Phillips CJ's comments in *R v Hamza* [2006] EWCA Crim 2918 although it did not specify which ones.[6]

32. It gave examples from the withheld information in support of its position.

[6] http://www.bailii.org/ew/cases/EWCA/Crim/2006/2918.html

Balance of public interest arguments

33. The Commissioner acknowledges that there is a legitimate public interest in increasing public understanding of the position of the Duchy of Cornwall with respect to its liability under the law. Those who challenge the correctness and legality of the situation would have an opportunity to see whether and to what extent the Duchy's particular position in law has been considered.

34. There is also a public interest in increasing public understanding of how legislation is drafted, particularly where peculiar factors such as the Duchy of Cornwall's legal position must be taken into consideration.

35. The complainant speculated whether in fact, "pre-existing standard advice" is used. If it is, in the complainant's view, it is arguable whether it attracts legal professional privilege and, by extension, even if it did, the public interest in protecting it is much weaker.

36. The Commissioner is considering other similar cases which relate to the Duchy of Cornwall's position with respect to other legislation. He is satisfied that the information withheld in this case has not been automatically transposed to or from these other cases. It is a bespoke consideration of the legislation to which the request relates.

37. In line with relevant case law, the Commissioner accords significant weight to the maintenance of legal professional privilege. Whilst he recognises that this exemption should not become, in effect, an absolute exemption, it is the case that there would need to be very clear, specific public interest grounds for the public interest in the maintenance of legal professional privilege to be overridden.

38. Having reviewed the withheld information and taking all the circumstances into account, the Commissioner is satisfied that there are not any sufficiently clear, specific grounds for the public interest in maintaining legal professional privilege to be overridden. He considers that the public interest in maintaining legal professional privilege outweighs the public interest in disclosure of the information. He acknowledges the seriousness of the complainant's concerns about the legal position of the Duchy of Cornwall. However, he does not agree that this adds sufficient weight to the public interest in disclosure in this case.

Section 42(1) – conclusion

39. The Commissioner is satisfied that all the withheld information is exempt under section 42(1). It all attracts legal professional privilege and the

public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure.

40. Having reached this conclusion with regard to section 42(1), the Commissioner has not gone on to consider the application of section 35(1)(a) which the Cabinet Office applied to some of the withheld information.

Right of appeal

41. 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 123 4504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.

43. 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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