

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 March 2015

**Public Authority:** Treasury Solicitor's Department  
**Address:** One Kemble Street  
London  
WC2B 4TS

### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Treasury Solicitor's Department (TSol) for guidance it provided to other government departments in the event of freedom of information cases being appealed to the Information Commissioner's Office or progressed beyond that stage. TSol explained that it held information falling within the scope of the request but refused to provide it on the basis of section 42(1) (legal professional privilege) and section 31(1)(c) (administration of justice) of FOIA.
2. The Commissioner has decided that only parts of the withheld information are exempt from disclosure on the basis of section 31(1)(c), albeit that for such information the public interest favours maintaining this exception. The Commissioner has also decided that the remaining information contained in the document is not exempt from disclosure on the basis of section 42(1) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a redacted copy of the document 'FOI Litigation: A Strategy'. The only redactions which can be made are

to the parts of the document which the Commissioner accepts are exempt from disclosure on the basis of section 31(1)(c) of FOIA.<sup>1</sup>

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. The complainant submitted the following request TSOL on 25 March 2014:

*'The Treasury Solicitor's Department provides services to other public authorities in Freedom of Information cases which have been appealed to the Information Commissioner or have progressed beyond that stage. I expect that the Department keeps a body of guidance and 'lines to take' on which staff and counsel working on those cases can draw.*

*I would like to request a copy of the body of resources that are not publicly available which are made available to staff or counsel working on Freedom of Information cases.'*

6. TSol responded on 15 April 2014 and confirmed that it held information falling within the scope of the request but it considered it to be exempt from disclosure on the basis of sections 42(1) and 31(1)(c) of FOIA.
7. The complainant contacted TSol on the same day and asked it to undertake an internal review of this decision.
8. TSol informed him of the outcome of the review on 31 July 2014. It explained that when his request was originally considered (and refused) the material withheld did not actually fall within the scope of the request. However, the internal review had identified the information that TSol held which did fall within the scope of the request, albeit that it was of the view that this information was also exempt from disclosure on the basis of sections 42(1) and 31(1)(c) of FOIA.

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<sup>1</sup> The Commissioner has provided TSol with a confidential annex in order to identify which parts of the document he accepts are exempt from disclosure on the basis of section 31(1)(c).

## Scope of the case

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9. The complainant contacted the Commissioner on 15 September 2014 to complain about TSol's decision to withhold the information he had requested. The information falling within the scope of the request consists of a document entitled 'FOI Litigation: A Strategy'.
10. The Commissioner has considered whether the information is exempt from disclosure on the basis of either of the exemptions cited by TSol.

## Reasons for decision

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### Section 31 – law enforcement

11. Section 31(1)(c) of FOIA that information is exempt if its disclosure would, or would be likely to prejudice the administration of justice.

#### TSol's position

12. In support of its reliance on this exemption TSol noted that there is no definition of 'administration of justice' in FOIA, but the concept should be construed widely to include all aspects of justice, and extending to statutory adjudicators such as the Information Commissioner. TSol argued that the administration of justice may be prejudiced in an individual case, or by something happening to the general process by which justice is delivered. It suggested that aspects of the administration of justice that could be prejudiced by the disclosure of information include the ability of litigants to bring cases, and the prospects of a fair trial taking place.
13. More specifically, TSol argued that disclosure of the information in question would or would be likely to prejudice the administration of justice. This was because disclosure of the government's litigation strategy for FOI cases would reveal the government's views about the strategic objectives to be achieved in litigation, the relative importance that it places on different aspects of its arguments, and the circumstances in which concessions might or might not be made. TSol suggested that disclosing such information would significantly risk undermining the government's ability to give effect to its strategy, because it would give the government's opponents in litigation a systematic and continuing tactical advantage. This would in turn, it argued, prejudice government departments' ability to argue cases in the most effective way, and would undermine the ability of the Information Commissioner, the tribunals and the courts to consider those cases fairly

because one of the parties to the proceedings would be at a persistent disadvantage.

### The Commissioner's position

14. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

15. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice which TSol envisages would be likely to occur if the withheld information was disclosed clearly relates to the interests which the exemption contained at section 31(1)(c) is designed to protect.

16. With regard to the second criterion, the Commissioner accepts that it is logical to argue that disclosure of information which would undermine the government's ability to give effect to its FOI litigation strategy could harm the administration of justice. This is because provision of such information could, in the Commissioner's view, plausibly provide an advantage to the government's opponents in any FOI litigation. For example, as TSol highlighted, it could make any opponents aware of particular points which the government might concede in certain cases.

17. However, in the Commissioner's opinion a significant amount of the withheld information focuses on the procedural aspects of the FOI

litigation process, details which are either in the public domain or are so operationally focused that it is very difficult to see how their disclosure could realistically have any impact on the government's ability to implement its FOI litigation strategy. Consequently, the Commissioner is not prepared to accept that there is a causal relationship between disclosure of information of this nature and the prejudice to the administration of justice. In contrast, the Commissioner accepts that disclosure of the other parts of the document could genuinely reveal confidential aspects of the government's litigation strategy and thus there is a causal relationship between disclosure of this information and harm which the exemption is designed to protect. Furthermore, the Commissioner is satisfied that the resultant prejudice which TSol believes could occur if this information was disclosed can be correctly categorised as real and of substance.

18. In relation to the third criterion, the Commissioner is satisfied that disclosure of the information which reveals confidential aspects of the government's litigation strategy represents more than a hypothetical risk of harming the administration of justice. Rather, disclosure would present a real and significant risk. The Commissioner has reached this finding given the number of different aspects of the government's strategy which the relevant aspects of the document address and the fact that disclosure risks undermining not simply the government's ability to litigate one FOI case but potentially all FOI cases going forward.
19. The Commissioner has therefore concluded that section 31(1)(c) is engaged but only in respect of certain parts of the withheld document. As noted earlier in this notice, the Commissioner has provided TSol with an annotated copy of this document in order to identify to which parts he accepts are exempt from disclosure on the basis of this exemption.

#### Public interest test

20. Section 31 is a qualified exemption and therefore the Commissioner must consider the public interest test and 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 in maintaining the exemption*

21. TSol argued that there was a very significant public interest in protecting the administration of justice and ensuring the fair treatment of all parties during litigation. In the circumstances of this case it suggested that disclosure of this information would not serve any particular public interest. Furthermore, TSol argued that disclosure of the information would not help either the other party, or the adjudicator to reach a fairer

outcome; rather such an interest is protected by the normal litigation process in which the government's arguments can be debated and scrutinised.

*Public interest in disclosing the information*

22. TSol acknowledged the public interest in public authorities being accountable for the quality of their decision making and that such accountability will be enhanced if there is transparency in the decision-making process and access to the information on the basis of which decisions have been made.
23. The complainant did not provide any specific submissions to support his view that the public interest favoured disclosure of the withheld information.

*Balance of the public interest arguments*

24. In the Commissioner's view disclosure of the information which he accepts is exempt on the basis of section 31(1)(c) would clearly provide the public with some insight into the government's strategic aims in respect of FOI litigation, and moreover its approaches to achieving such aims. Consequently, disclosure of the information would increase transparency in relation to how the government makes decisions in relation FOI requests. In the Commissioner's view the public interest in such an outcome should not be underestimated given both the significant number and breadth of topics of FOI requests which government departments receive each year.
25. However, the Commissioner agrees with TSol that there is a very significant public interest in ensuring that the administration of justice is not undermined. In the Commissioner's view, the arguments in favour of maintaining the exemption attract additional notable weight in the circumstances of this case, given that the disclosure risks undermining the government's position in all future FOI cases brought before either the Information Commissioner or the Tribunal or courts. In light of this the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

**Section 42 – legal professional privilege**

26. TSol also relied on section 42(1) of FOIA to withhold the document in its entirety. As the Commissioner has already concluded that some of the information is exempt from disclosure on the basis of section 31(1)(c) he has not considered the application of section 42(1) to such information. Instead he has simply considered whether section 42(1) provides a basis to withhold the information which he has already

concluded is not exempt from disclosure on the basis of section 31(1)(c) (ie 'the remaining information').

27. Section 42(1) 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.
28. There are two categories of legal professional privilege: advice privilege and litigation privilege.
29. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.
30. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem.
31. TSol argued that the withheld document comprises records and summarises of confidential advice that had been given to government departments by external and in-house lawyers, both as general advice about departments' legal obligations under FOIA and as advice for the purpose of litigation that was in reasonable prospect. It suggested that, as the main purpose of the withheld document was to give advice about the conduct of FOI litigation, this information attracted litigation privilege. It also argued that some aspects of the document attracted advice privilege, given that some of it reflects legal advice given in other contexts.
32. The Commissioner is not prepared to accept that the information which is not exempt under section 31(1)(c) can be said to attract legal professional privilege, be it advice privilege or litigation privilege. He has reached this view for two broad reasons: Firstly, the provenance of such information is unclear: although TSol asserted that it comprises and

summarises confidential legal advice it is far from clear to the Commissioner whether this is in fact the case based on an examination of the document and the submissions TSol provided him during in relation to this complaint. Secondly, in the Commissioner's view the remaining information consists of a description of the legal process, or sets out, or simply repeats accepted operational aspects of the FOI litigation process. Such information – even if it did originate from advice given by lawyers - could not, in the Commissioner's opinion, be considered to be confidential and thus attract privilege.

33. Consequently, the Commissioner has concluded the remaining information is not exempt from disclosure on the basis of section 42(1) of FOIA.



## Right of appeal

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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: 0870 739 5836

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)

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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**