

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2015

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking a copy of any legal advice it held on the potential impact of the Transatlantic Trade and Investment Partnership. The Cabinet Office refused to confirm or deny whether it held any information on the basis of section 42(2), the legal professional privilege exemption. The Commissioner has concluded that section 42(2) is not engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - confirm or deny whether information falling within the scope of the request is held, and disclose or refuse any information identified.
3. 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

4. The complainant submitted the following request to the Cabinet Office on 23 October 2014:

'I would like to obtain any legal advice the Cabinet Office has received on the potential impact of TTIP [Transatlantic Trade and Investment Partnership].'

5. The Cabinet Office responded on 5 November 2014 and refused to confirm or deny whether it held the requested information on the basis of section 42(2) of FOIA, the legal professional privilege exemption.
6. The complainant contacted the Cabinet Office on 25 November 2014 in order to complain about the application of this exemption and asked it to conduct an internal review.
7. The Cabinet Office informed him of the outcome of the review on 5 January 2015. The review upheld the application of section 42(2).

Scope of the case

8. The complainant contacted the Commissioner on 10 February 2015 in order to complain about the Cabinet Office's reliance on section 42(2) of FOIA to refuse to confirm or deny whether it held the requested information. He also argued that if the requested information was held, then this should be disclosed.
9. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
10. As explained above, the Cabinet Office is seeking to rely on section 42(2) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore this notice only considers whether the Cabinet Office is entitled, on the basis of this exemption, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 42 – legal professional privilege

11. Section 42 of FOIA states that:

'(1) 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.'

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.'

The Cabinet Office's position

12. In order to support its reliance on section 42(2) the Cabinet Office noted that the requested information, if held, would be covered by legal professional privilege (LPP). However, it argued that more importantly, disclosing whether or not the information in question is held would itself reveal privileged information. The Cabinet Office emphasised that it was absolutely imperative to the effective conduct of public affairs that it could seek legal advice in confidence if it chooses to do so. It argued that if legal advice had been sought on TTIP in this instance – and it was neither confirming nor denying whether it had been – such advice would have been sought in confidence. The Cabinet Office explained that it has never previously disclosed whether or not it had sought legal advice on the potential impact of TTIP and so to disclose that fact would be to disclose privileged information.

The complainant's position

13. The complainant argued that in the circumstances of this request complying with the duty to confirm or deny whether the information is held was not capable of amounting to revealing something about the advice itself. Rather he suggested that compliance with the duty contained at section 1(1)(a) of FOIA in relation to his request would only require the Cabinet Office to confirm or deny whether it had obtained legal advice on the potential impact of TTIP. He did not consider the fact such advice had been obtained – or indeed not obtained – to be privileged.
14. In support of this position the complainant referred to the following hypothetical example in the Commissioner's guidance '*When to refuse to confirm or deny information is held*':

'Section 42 (legal professional privilege) only permits the authority to refuse to confirm or deny whether information is held if this would itself reveal information (including unrecorded information) which is subject to legal professional privilege.

If a public authority received a request for "any legal advice you have received about XYZ Ltd", it would have to confirm whether or not it held such advice. A public authority could only refuse to confirm or deny if the request required them to reveal something about the

content of the advice that would be covered by legal professional privilege. A neither confirm nor deny response could be given if a request was made for "any legal advice you have received which confirms that XYZ Ltd was acting illegally". Confirming that such information was held would reveal that the public authority had advice that said XYZ Ltd was acting illegally.¹

The Commissioner's position

15. In the Commissioner's opinion although the overarching purpose of LPP is to protect the confidentiality of a clients' discussions with their lawyers, what LPP specifically protects is the *content* of those discussions. Therefore, the fact that a meeting was held between a legal adviser and client will not be privileged information. However, information contained in the minutes of the meeting or a file note setting out the key points discussed at the meeting is likely to attract privilege. This is essentially the rationale that underpins the example given in the Commissioner's guidance which was quoted by the complainant.

16. It is also consistent with the case law on this issue. For example, Mr Justice Mann in *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch) found that:

"The proper analysis, consistent with Three Rivers, is to continue to afford privilege to material which evidences or reveals the substance of legal advice."

17. In the Commissioner's view the key word is 'substance'. Section 42(2) is about whether confirming or denying would involve the disclosure of legally privileged information, ie, following Mann J, "*material which evidences or reveals the substance of legal advice.*" Consequently, to simply confirm or deny whether a public authority has obtained advice on a particular issue, without any more detail than this more, does not reveal the substance of that legal advice.

18. Furthermore, the Commissioner also notes that this position is consistent with the position set out in the Ministry of Justice's working assumption on legal advice. This states that:

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https://ico.org.uk/media/fororganisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf page 7

*'The current view is that LPP does not, in usual circumstances, attach to the fact that legal opinion has been sought, and therefore the LPP exemption cannot usually be relied upon to protect this fact alone. However, officials should note that, in some circumstances, the fact that legal advice has been sought may be protected by LPP, for example where disclosing the very fact that legal advice was sought would itself disclose something of the substance of the advice.'*²

19. In the circumstances of this request, the Commissioner believes that by complying with section 1(1)(a) of FOIA the Cabinet Office would not reveal anything about the substance of any advice that may have been sought. The wording of the request – seeking as it does legal advice on 'the potential impact of TTIP' – is in effect no different from a request which simply seeks legal advice on TTIP. In the Commissioner's opinion the Cabinet Office can therefore comply with the obligation at section 1(1)(a) of FOIA without revealing information which itself would be privileged. Consequently, the Commissioner has concluded that the Cabinet Office cannot rely on section 42(2).

² <https://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/working-assumptions/foi-assumptions-legal>

Right of appeal

20. 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

21. 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.
22. 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