

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2015

Public Authority: Office for National Statistics
Address: Government Buildings
Cardiff Road
Newport
NP10 8XG

Decision (including any steps ordered)

1. The complainant made a request for information to the Office for National Statistics (ONS) for information regarding a dispute about infringement of copyright. The ONS disclosed some of the requested information but withheld some information under the exemption in section 42 (legal professional privilege).
2. The Commissioner's decision is that the section 42 exemption was correctly applied and the public interest in maintaining that exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 2 March 2015 the complainant made a request for information to the ONS regarding a dispute about infringement of copyright involving his company and the ONS. The request read as follows:
 - 1) *Who is responsible at director level for handling this dispute at ONS.*
 - 2) *The details of your application to the Treasury for funds to settle this dispute.*
 - 3) *The legal costs since January 2012 to date ONS has spent related to this dispute.*
 - 4) *The legal costs incurred by ONS related to an FOI request we made related to this dispute. Information Tribunal reference EA/2013/0198*

- 5) *The internal costs ONS has spent to date related to this dispute.*
- 6) *Any current project plans and/or specifications related to planned changes to record management software at ONS.*

4. The ONS responded to the request on 26 March 2015 when it disclosed some of the requested information. However, for other parts of the request the information was not held or else it was exempt from disclosure under section 42 of FOIA.
5. On the same day the complainant contacted ONS to ask that it carry out an internal review of its handling of the request. In particular he said that he was dissatisfied with the ONS' response to parts 2, 3 and 4 and its application of the section 42 exemption.
6. The ONS presented the findings of the review on 19 May 2015. The review upheld the response to part 2 of the request but overturned the response to parts 3 and 4. This information was disclosed to the complainant.

Scope of the case

7. On 26 May 2015 the complainant contacted the Commissioner to complain about the ONS' decision to refuse to disclose the information in part 2 of his request.
8. The Commissioner agreed with the complainant that the scope of his investigation would be to consider whether the section 42 exemption was correctly applied to part 2 of his request.
9. During the course of the Commissioner's investigation the ONS said that it was also seeking to rely on the section 43 exemption (commercial interests).

Reasons for decision

Section 42 – Legal professional privilege

10. Section 42 provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

11. Legal professional privilege is a common law concept that protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal 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 third parties if such communication or exchanges come into being for the purpose of preparing for litigation."
12. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated.
13. In this case litigation privilege is the relevant type of privilege. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between third parties so long as they are made for the purposes of the litigation.
14. The ONS explained that the complainant's company was currently suing it for copyright infringement and breach of contract over the creation of its Electronic Records Management software following the cancellation of its contract with them. It explained that ONS has defended the claim and both parties' solicitors are in the process of agreeing directions for case management. It provided the Commissioner with a case number for the High Court Chancery Division.
15. The Commissioner has reviewed the information requested by the complainant and found that it is very clearly a communication made for the purposes of litigation given that it concerns his company's claim against ONS for breach of copyright and discusses how the litigation should continue including its tactics for defending the claim.
16. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports. Therefore, it's not just legal advice covered by the exemption but any communications made for the purpose of litigation. In this case, the withheld information refers extensively to legal advice obtained in relation to the claim regarding copyright infringement against the ONS. The Commissioner does not see how the withheld information could be redacted to remove the legal advice without making any remaining information effectively meaningless. The Commissioner is satisfied that the information is held

for the dominant purpose of assisting in the litigation and that therefore it attracts legal professional privilege.

17. The complainant had sought to argue that the information was generated as part of a mediation process, voluntarily entered into by both parties with the agreement of the Court. He said that the litigation was stayed and as such the ONS could not claim that the information was held for the purpose of litigation. The Commissioner has considered the arguments but does not accept that the information is not related to litigation. Whilst it appears that both parties had entered into mediation this was part of the wider litigation process. The case may have been stayed but there is clearly the possibility that the case would be resumed should mediation not be successful. For these reasons the Commissioner has decided that the information remains privileged and that therefore the section 42 exemption is engaged.

Public interest test

18. Section 42 is only a qualified exemption and therefore the Commissioner has gone on to carry out a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest arguments in favour of disclosure

19. In favour of disclosure the public authority said that there was a small public interest in the sense that this would shed light on the spending of public money.

Public interest arguments in favour of maintaining the exemption

20. In favour of maintaining the exemption the ONS argued that disclosure would have a prejudicial impact on the ongoing litigation. It also said that disclosure of the information would be detrimental to the public in terms of public finances. This is because if the document were made public this could unfairly strengthen the case against ONS and may in turn be more costly to ONS and therefore the wider public.
21. The ONS went on to say that in its view there was a public interest in allowing a free and frank exchange of communication between ONS and Treasury Solicitors (the Government legal advisers) as well as ONS and HM Treasury in relation to the ongoing litigation.
22. It said that since litigation was still ongoing it would not be appropriate to disclose the information. It suggested that there may be reputational damage to ONS if early disclosure of the information damaged its legal case.

Balance of the public interest arguments

23. In balancing the public interest the Commissioner's view is there is an inbuilt public interest in withholding information which is subject to legal professional privilege. Therefore, the Commissioner's approach, backed by successive tribunals, is to afford an initial weighting in favour of maintaining the exemption. Only in very clear cut cases will the public interest in disclosure outweigh the public interest in protecting the principle behind LPP, i.e. safeguarding openness in all legal communications to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
24. As well as the inherent public interest in the principle of legal professional privilege the Commissioner will also take into account the particular circumstances of the case. For instance, where the information is live or recent there will be an even stronger case for withholding the information. In this case the litigation was still ongoing and the information was only a few months old at the time of the request. Disclosure at this point would clearly be unfair to ONS in that it would give one party an advantage in the legal proceedings. This would not be in the public interest and this adds even more weight to the public interest in maintaining the exemption. As suggested by the ONS, there is a further consequence if disclosure would unfairly strengthen the case against ONS which would be costly to ONS and ultimately the public purse. This also weighs in favour of maintaining the exemption.
25. As regards the public interest in disclosure, the Commissioner has found that these arguments carry very little weight in what is essentially a case of the complainant pursuing a private interest in the sense that disclosure would give his company an advantage in its dispute with the ONS rather than promoting any wider public interest in terms of transparency and accountability. Whilst disclosure would reveal information about the spending of public money, the outcome of the case would in any event be made public once the legal proceedings are complete. Therefore, public transparency will be achieved once the case is concluded.
26. The Commissioner has concluded that the arguments for disclosure are limited and strongly outweighed by both the general public interest in protecting the principle of legal professional privilege and on the particular circumstances of the case. The Commissioner's decision is that the public interest favours maintaining the exemption.

Section 43 – Commercial interests

27. The Commissioner is satisfied that the information can be withheld under the section 42 exemption and therefore he has not gone on to consider whether section 43 might also apply.

Right of appeal

28. 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

29. 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.
30. 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

Pamela Clements
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