

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2016

Public Authority: Attorney General's Office
Address: 20 Victoria Street
London
SW1H 0NF

Decision (including any steps ordered)

1. The complainant requested information relating to cost applications in *R v Coulson and Others* (aka "the phone hacking trial").
2. The Commissioner's decision is that the Attorney General's Office has applied section 32 (court records) and 42 (legal professional privilege) appropriately. The Commissioner also considers that the Attorney General's Office was correct to state that, on the balance of probabilities, it does not hold recorded information in relation to part of the request.
3. The Commissioner does not require the Attorney General's Office to take any further steps as a result of this decision.

Background

4. In the case of *R v Coulson and Others*, the defendants were accused of hacking the telephones of various individuals. At the end of the trial, the acquitted defendants made an application for their costs to be met out of central funds.
5. Mr Justice Saunders (the trial judge) asked the Attorney General to appoint an Advocate of the Court who is appointed at the request of a court to assist with guidance on the law, when such assistance might not otherwise be available. The Advocate's function is to provide assistance on the relevant law and its application to the facts of the case. Once an appointment has been approved by the Attorney General, it instructs the Government Legal Department (which used to be called the Treasury Solicitor's Department), who act on behalf of government

and public bodies in courts and tribunals. After the appointment is made, the Attorney General has no further role.

6. However, before the Advocate's submission was lodged with the court, the defendants withdrew their application for costs from central funds. This meant that the costs application was not heard.

Request and response

7. On 8 October 2014, the complainant wrote to the Attorney General's Office (AGO) and requested information in the following terms:

"I wish to know the following information regarding the costs from Central Funds applications made on behalf of Mrs. Rebekah Brookes, Mr Charles Brookes, Mrs Cheryl Carter, Mr, Mark Hanna, Mr. Stuart Kuttner, Mr. Clive Goodman and Mr. Ian Edmondson, heard at the Central Criminal Court before Mr. Justice Saunders between June 2014 and September 2014.

1. What is the text of the correspondence and/or Skeleton Arguments between HM Attorney-General's Chambers and/or Mr. Justice Saunders and/or the Ministry of Justice regarding the appearance of an "Advocate to the Court" at the then proposed hearings to determine the Defendants' application of costs from Central Funds?

2. Was any correspondence and/or Skeleton Arguments sent to HM Attorney-General's Office by the Ministry of Justice regarding the then proposed hearings to determine the Defendants' applications of costs from Central Funds?

3. If so, what is the text of that correspondence and/or Skelton Arguments?

4. What is the text of the correspondence between the Ministry of Justice and/or the Treasury Solicitors acting on its behalf and News UK and/or their legal representatives regarding the appearance of the Ministry of Justice at the then proposed hearings to determine the Defendants' applications for costs from Central Funds?

5. If so, what is the name of their legal representatives?

6. If so, what is the text of that correspondence and/or Skeleton Arguments?"

8. The AGO responded on 6 November 2014. It confirmed that in relation to questions 1, 2 and 3 it held internal correspondence relating to the

litigation, correspondence between the AGO, Treasury Solicitors Department (TSOL) and the court, legal submissions by Counsel and material provided by Mr Justice Saunders (the trial judge). It confirmed that it was applying sections 32 to some of the information and section 42 to the rest. In relation to questions 4, 5 and 6, the AGO confirmed that it did not hold any information.

9. In his request for an internal review of 7 November 2014 the complainant explained that he was not asking for a review in relation to questions 4-6 but he did not accept that sections 32 and 42 had been applied to questions 1-3 appropriately. Following an internal review the AGO wrote to the complainant on 5 December 2014. It upheld its application of sections 32 and 42 in relation to questions 1, 2 and 3.

Scope of the case

10. The complainant contacted the Commissioner on 29 December 2014 to complain about the way his request for information had been handled. The Commissioner notes that in the complainant's request for an internal review, he stated that he was not seeking a review of the AGO's response to questions 4, 5, and 6.
11. The complainant explained that he did not consider that section 32 could be applied to any of the skeleton arguments sent on behalf of the defendants to court. He explained that these appeared to be copies of the originals which were sent to the court, therefore the copy had not been "filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter". The complainant also pointed out that no information had been provided as to who served the copy of the skeleton argument on the Attorney-General.
12. The complainant also considered that a submission from Mr Justice Saunders which was being withheld under section 32(1)(c) should be disclosed if it was a submission for the benefit of the recipients. The complainant explained that he considered that this was not a document prepared for the court, but for the recipients and therefore could not be caught by section 32. He also referred to the AGO's reference to additional correspondence from the court and the fact that the AGO was not clear what this was about and which subsection of section 32 applied to it.
13. The complainant also considered that the AGO had not applied section 42 appropriately. He explained to the Commissioner that he considered that the officials at the AGO were not public civil servants and were not therefore acting in the capacity of legal advisers to the Attorney General.

14. During the Commissioner's investigation the AGO confirmed that it had found another 19 documents which had not been considered previously. It explained that this meant that it did hold information in relation to questions 5 and the second part of question 6 ie regarding skeleton arguments, but not to question 4 or the first part of question 6 ie relating to the text of correspondence between the Ministry of Justice (MoJ) and the TSoL. The AGO confirmed that it had included the 19 documents it had found in the information it was withholding under section 32(1).
15. The Commissioner will consider whether the AGO has applied sections 32 and 42 appropriately.
16. Given that the AGO found a further 19 documents , the Commissioner will also consider whether, on the balance of probabilities, the AGO is correct to state that it does not hold any further information in relation to question 4 and the first part of question 6.

Reasons for decision

Section 32 – court records

17. Section 32(1) is a class based exemption. This means that any information falling within the category described is automatically exempt from disclosure. As section 32(1) is also an absolute exemption it is not subject to any public interest considerations.
18. Section 32(1) of FOIA provides:

“Information held by a public authority in exempt information if it is held only by virtue of being contained in –

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by –

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter.”

19. In relation to section 32(1)(a), the AGO has withheld the following information:

- Costs submissions by various parties.
- Email from Mr Justice Saunders to the Advocate of the Court.
- Skeleton arguments.
- A note on behalf of News UK regarding the appointment of the Advocate of the Court.
- A letter from the MoJ to the Court dated 6th August 2014.
- Case law.

Section 32(1)(a)

20. There are two tests to consider when deciding whether information falls within this exemption. First, is the requested information contained within a document filed with a court in relation to a particular cause or matter? Secondly, is this information held by the relevant public authority only by virtue of being held in such a document?

21. The AGO explained to the Commissioner that the documents withheld under section 32(1)(a), which included court judgments already in the public domain, had been given to it in its role in the appointment of an Advocate to the Court in the proposed costs proceedings. The AGO argued that it therefore held the requested information only by virtue of it having been submitted as part of a documents filed with the court for the purposes of costs proceedings.

22. The Commissioner has considered the documents withheld under section 31(1)(a). He is satisfied that they are held by the AGO in its role of appointing an Advocate to the Court in the proposed costs proceedings. Therefore, the Commissioner is satisfied that the withheld documents, including the court judgments, are held by the AGO by virtue of being contained documents filed with court for a particular cause of matter.

23. From the evidence provided, the Commissioner is satisfied that the AGO is entitled to apply section 32(1)(a) to all of the information it has withheld under it.

24. The Commissioner will go on to consider the application of section 32(1)(c). In relation to this exemption the AGO has withheld the following information:

- An agenda for hearing prepared by Mr Justice Saunders in R V Brooks.

- Email chain from Mr Justice Saunders to the AGO regarding the appointment of an Advocate to the Court, with an additional email chain from a lawyer acting for News UK.

Section 32(1)(c)

25. There are two tests to consider when deciding whether information falls within this exemption. First, is the requested information contained in any document created by a court, or a member of the administrative staff of a court? Secondly, is this information held by the relevant public authority?
26. The AGO explained to the Commissioner that the documents withheld under section 32(1)(c) had been given to it in its role in the appointment of an Advocate to the Court. It argued that it therefore held the requested information only by virtue of it having been created by a court.
27. The Commissioner notes that the information withheld under section 32(1)(c) was created by Mr Justice Saunders. The Commissioner will need to consider whether a judge can be considered as a court, for the purposes of section 32(1)(c), or whether he is a member of the court administrative staff.
28. The Commissioner notes that in the case of *Alistair Mitchell v IC EA/2005/0002* which dealt with this issue, the Information Tribunal said (paragraph 42):

"Documents can, of course, be created by computers but generally only where, however long the chain of communication, a human being has originated the process through an instruction, electronically communicated. Documents created by members of court staff are dealt with in s.32(1)(c)(ii) so that the creator for the purposes of subparagraph (i) must be somebody outside their ranks. In our opinion, this can only be the judge, for whom the term "court", or more often "the court", is a familiar synonym. Such an interpretation confers exempt status on documents which he produces, such as draft directions and judgments, unless or until they are incorporated into the public proceedings of the court and are recorded as such on tape in a transcript. He thereby controls access to such material up to the point when it is delivered in open court in final form. That seems to us to accord with common sense and sound public policy. We acknowledge that such a construction results in "a court" being given a different meaning in s.32(1)(c) from s.32(1)(a), where the reference is to the institution. It may also be said that Parliament could easily have used the term "a judge", if our construction is correct. We are nevertheless

driven to the conclusion that s.32(1)(c)(i) must refer to judicially created documents, though the drafting could have been clearer."

29. Taking the *Mitchell* decision into account, the Commissioner is satisfied that Mr Justice Saunders would be considered "a court" for the purposes of section 32(1)(c)(i). The Commissioner will go on to consider whether the information withheld under section 32(1)(c) was either in draft form or not part of the official proceedings.
30. The Commissioner notes that in the present case, the costs hearing was due to take place on 1 October 2014 but did not go ahead, as the defendants in question withdrew their applications for costs. The Commissioner is therefore satisfied that the information was not "*incorporated into the public proceedings of the court and are recorded as such on tape in a transcript*" as set out in the *Mitchell* decision above.
31. The Commissioner has also considered whether the information was held by the AGO for the purposes of proceedings in a particular cause or matter. The Commissioner notes that the AGO held the information in question in its role of appointing an Advocate of the Court in the proposed costs hearing. He is therefore satisfied that the AGO held the information for a particular cause or matter.
32. From the evidence provided, the Commissioner is satisfied that the AGO is entitled to apply section 32(1)(c) to most of the information withheld under it. However, in relation to the additional email chain from a lawyer acting for News UK, the Commissioner considers that this should have been withheld under section 42, as it deals with the appointment of the Advocate to the Court.
33. The Commissioner will go on to consider the AGO's application of section 42.

Section 42 – legal professional privilege

34. The AGO has withheld the following information under section 42:
 - Email chain between the AGO and MoJ about the appointment of a QC to appear on behalf of the MoJ in the costs hearing.
 - Email chain between the AGO and MoJ about the instruction of the Advocate of the Court.
35. As explained in paragraph 32, the Commissioner also considers that an additional email chain from a lawyer acting for News UK should also have been under section 42.

36. Section 42 provides that information where a claim to legal professional privilege could be maintained in legal proceedings is exempt. It is a class based exemption, which means that any information falling within the category described is exempt from disclosure. As section 42 is a qualified exemption, it is subject to the public interest test.

37. Legal professional privilege is a common law concept that protects the confidentiality of communications between a lawyer and client. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the Information Tribunal described it 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."

38. There are two types of legal professional privilege – litigation privilege and legal advice privilege.

39. 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.

40. In this case litigation privilege is the relevant 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.

41. The AGO explained that the withheld information was provided for the purposes of litigation, including communications with third parties, as the dominant purpose of the communication was to assist in the preparation of litigation. The emails in question relate to the appointment of a QC to represent the MoJ at the proposed costs hearing and also the appointment of an Advocate of the Court.

42. The AGO explained that it has to approve the appointment of Counsel who act on behalf of the Government, as the Attorney General has responsibility for the Government's litigation. In relation to the appointment of a QC, the government department in question (in this case the MoJ) is required to explain why a QC is needed, which requires analysis of the legal issues.

43. Litigation privilege applies to a wide variety of information, including advice, correspondence, notes, evidence or reports. The Commissioner has reviewed the withheld information and is satisfied that it consists of communications made for the dominant purpose of litigation, as it refers to the appointment of a QC to represent the MoJ and the appointment of an Advocate to the Court, in the proposed costs hearing.
44. The Commissioner is therefore satisfied that the information is held for the dominant purpose of assisting in the litigation and that it attracts legal professional privilege.
45. The Commissioner considers that section 42(1) is engaged and will go on to consider the public interest considerations.

Public interest test

46. The Commissioner will consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interests argument in favour of maintaining the exemption

47. The AGO argued that both the Information Tribunal and the High Court have consistently recognised that there is a very substantial public interest in maintaining the confidentiality of legally privileged information; and have also held that equally weighty factors in favour of disclosure must be present for the public interest to favour disclosure.
48. The AGO also argued that there is a clear public interest in any government litigation activity being governed by ordinary court procedure in the interests of fair administration of justice, rather than being subject to parallel public disclosure obligations, unless it is in the public interest to make an exception.
49. The AGO explained that it recognised that there was a public interest in understanding the general circumstances in which sums of money may be claimed from the public purse in litigation cases. However, it also explained that it did not agree that the general public interest translates directly into an overriding public interest in the disclosure of the details of a particular piece of litigation, especially as in the present case, the proposed litigation did not go ahead.

Public interest arguments in favour of disclosure

50. The Commissioner considers that some weight must always be given to the principles of accountability and transparency, through the disclosure of information held by public authorities. Disclosure of information can assist the public in understanding how public authorities reach decisions,

which in turn can help build trust in public authorities and may also allow greater public participation in the decision making process.

51. The complainant explained that he considered that the information should be disclosed. He explained that officials at the AGO are not public servants and therefore are not able to act as legal advisers to the Attorney General. The complainant also pointed to *Goodridge v Chief Constable of Hampshire* [1999] 1 WLR 1558 in support of this, in which the CPS was not allowed to claim legal professional privilege regarding information passed between the police and the DPP, as there was no evidence that the communications in questions had been made for the dominant purpose of providing legal advice.
52. The complainant also argued that in the present case, the Advocate to the Court would not have been advising the judge as his personal and private client; but would have been discharging a public duty to the general administration of justice at any future hearing on costs at the Central Criminal Court, therefore the principles in *Goodridge* applied.
53. Furthermore, the complainant argued that the matter was particularly relevant as fresh allegations were surfacing regarding Ms Brookes involvement in the payment of public officials.

Balance of the public interest arguments

54. The Commissioner considers that 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 of LPP, ie 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.
55. 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 example, where the information is live or recent there will be a stronger case for withholding the information.
56. The Commissioner has considered all of the arguments. With regard to the complainant's argument that the officials at the AGO are not public servants and therefore are not able to act as legal advisers to the Attorney General, he does not consider that this is the case. The Commissioner notes that the Attorney General has responsibility for the Government's litigation and that the withheld information was provided

to it in its role of appointing an Advocate to the Court in the proposed costs proceedings.

57. The Commissioner considers that the information was created with the dominant purpose of litigation. He is satisfied that the AGO's role of appointing an Advocate to the Court means that it would hold the documentation for the dominant purpose of litigation. He is satisfied that the officials at the AGO are public servants and could give advice to the Attorney General regarding the appointment of an Advocate of the Court.
58. The Commissioner therefore does not agree with the complainant's argument that the principles in the *Goodridge* case apply to the present case.
59. The Commissioner also notes the complainant's argument that disclosure was necessary as fresh allegations were being made against Ms Brookes. In its internal review, the AGO explained that it did not consider that the public interest in disclosure of the withheld information would be enhanced by the subsequent emergence of further allegations regarding Ms Brooks which have no immediately obvious relevance to the withdrawn claim for costs.
60. The Commissioner considers that even though there may be other allegations being made regarding Ms Brooks, the disclosure of the withheld information in question would not be relevant, as it relates to the proposed costs proceedings.
61. The Commissioner also gives weight to the fact that in this case, the costs proceedings in question did not actually take place, as the applicants withdrew their claim for costs from the Central Court.
62. 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 in the particular circumstances of this case. The Commissioner's decision is that the public interest favours maintaining the section 42 exemption.
63. The Commissioner will go on to consider whether the AGO holds any information in relation to question 4 and the first part of question 6.

Section 1 – general right of access

64. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have it communicated to him.

65. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any reasons offered by it to explain why the information is not held. In addition, the Commissioner will consider any reason why it is inherently likely or unlikely that the information is not held.
66. In the present case, the Commissioner notes that the AGO initially confirmed that it did not hold any information in relation to questions 4, 5 and 6. However, during the Commissioner's investigation, the AGO confirmed that it was only in relation to question 4 and the first part of question 6 regarding the text of correspondence between the MoJ and TSoL, that it did not hold any information.
67. The AGO explained that this was because it was not routinely copied into correspondence between the MoJ and third parties.
68. The Commissioner is required to make a judgement on whether, on the balance of probabilities, the requested information is held or not.
69. The Commissioner enquired whether the information had ever been held and about the scope, quality, thoroughness and results of the searches carried out by the AGO. The Commissioner also enquired whether the information had ever been held but deleted and whether copies of information may have been made and held in other locations.
70. The AGO explained that it had searched its electronic data bases, electronic filing system and its electronic file index system. It confirmed that it had searched its networked resources as the information would not have been kept on personal files.
71. With regard to whether the information had ever been held and subsequently deleted, the AGO explained that if it held the requested information it would have been in electronic or manual files. It also explained that it had not identified any deleted information.
72. The Commissioner also asked whether there was any legal requirement or business need for the AGO to hold the information. The AGO explained that there was no reason for it to hold the requested information.
73. Furthermore, the Commissioner considered whether the AGO had any reason or motive to conceal the requested information, but he has not seen any evidence of this.

74. Taking everything into account, the Commissioner does not consider that there is any evidence that show that the AGO holds any recorded information in relation to question 4 and the first part of question 6.
75. Therefore, the Commissioner is satisfied that, on the balance of probabilities, the AGO does not hold any recorded information in relation to question 4 or the first part of question 6. Accordingly, he does not consider that there is a breach of section 1 of the FOIA.

Right of appeal

76. 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

77. 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.
78. 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

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