

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2021

Public Authority: Government Legal Department
Address: 102 Petty France
London
SW1H 9GL

Decision (including any steps ordered)

1. The complainant requested information about instructions Government Legal Department (GLD) was given in respect of specific legal proceedings.
2. GLD provided some information within the scope of the request but refused to provide the remainder, citing section 42(1) (legal professional privilege) of the FOIA.
3. The Commissioner's decision is that GLD correctly applied section 42(1) of the FOIA to the withheld information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. By way of background to the request under consideration, GLD told the Commissioner:

"The request arises from GLD's representation of the Driver and Vehicle Licensing Agency (DVLA) before the First Tier Tribunal (FTT) in respect of a FOIA request previously submitted by [the complainant] to the DVLA".

6. In response to his request for information, GLD told the complainant:

"To the extent you request "instructions and etc." we can confirm that we hold instructions provided to us by the Department for

Transport (of which the Driver and Vehicle Licensing Agency is an executive agency) in respect of the litigation brought by you before the First Tier Tribunal, wherein we are instructed”.

Request and response

7. On 6 July 2020, the complainant wrote to GLD and requested information in the following terms:

“... so I request under both GDPR [General Data Protection Regulation] and FOI to be supplied with all instructions and etc you have been given”.
8. GLD responded on 2 September 2020. It refused to provide the requested information under the FOIA citing the following exemption:
 - section 42 legal professional privilege
9. Following an internal review GLD wrote to the complainant on 24 September 2020 maintaining its original position.

Scope of the case

10. The complainant contacted the Commissioner on 29 October 2020 to complain about the way his request for information had been handled.
11. It is accepted that the request was in relation to tribunal proceedings between the complainant and the DVLA (the DVLA being a client of GLD).
12. While the request references both the GDPR and the FOIA, this decision notice is only concerned with whether GLD handled the request in accordance with the FOIA.
13. During the course of the Commissioner’s investigation, GLD revisited its handling of the request. As a result it wrote to the complainant, clarifying its response and providing him with some of the previously withheld information. It confirmed that the remaining information within the scope of the request was being withheld by virtue of section 42.
14. The analysis below considers GLD’s application of section 42 of the FOIA to the withheld information. That information comprises email exchanges between the DVLA and GLD.
15. The Commissioner acknowledges that, given the nature of email chains, which often overlap, the withheld information contains duplicates.

Reasons for decision

Section 42 - legal professional privilege

16. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
17. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
18. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023) (*Bellamy*) 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 their parties if such communications or exchanges come into being for the purposes of preparing for litigation."
19. There are two categories of LPP – 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 may apply whether or not there is any litigation in prospect 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.
20. In this case, GLD considered that the information withheld by virtue of section 42(1) is exempt from disclosure because it is subject to litigation privilege. GLD told the complainant:

"The information you seek has been communicated between clients and lawyers for purposes of obtaining legal advice and representation in respect of litigation and so is exempted pursuant to section 42 of the FOIA, as it is information subject to legal professional privilege".

21. Similarly, in its submission to the Commissioner, GLD confirmed its view that the email exchanges in question are subject to LPP and remain privileged.
22. In support of its application of the exemption, GLD told the Commissioner:

"• Litigation was clearly underway. The FOIA request relates to instructions provided in respect of the matter before the FTT ...;

• The dominant purpose of the communications is manifestly to obtain advice and legal representation in respect of the litigation...

• The communications were clearly confidential exchanges between a professional legal adviser and their client. The GLD is acting here in its capacity as the legal representative of the DVLA and the communications are clearly between the GLD lawyer with conduct of the case and the relevant client team in the DVLA charged with handling the matter before the FTT".

Is the exemption engaged?

23. Having had the benefit of viewing the information withheld by virtue of section 42, the Commissioner is satisfied that it constitutes communications between a lawyer and their client and that it clearly relates to legal matters.
24. She is also satisfied that the communications were made in the context of representation in respect of litigation proceedings for the dominant (main) purpose of seeking or giving legal advice.
25. Having established that the requested information falls within the definition of LPP, the next matter for the Commissioner to consider is whether privilege has been lost or waived.
26. The Commissioner regards the key to deciding whether the right to claim LPP has been lost will be to consider whether previous disclosures to the world at large mean that the information can no longer be said to be confidential.
27. In this case, the Commissioner is not aware of any disclosure of the information under consideration to the world at large. Nor has the complainant put forward any arguments claiming that privilege has been lost or waived.
28. Therefore she finds that section 42 is engaged in respect of the withheld information.

The public interest test

29. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

30. The complainant did not put forward any public interest arguments in favour of disclosure.
31. In its correspondence with the complainant, GLD acknowledged that there is a general public interest in transparency and accountability of public authorities, including their dealings with one another.

Public interest arguments in favour of maintaining the exemption

32. In favour of maintaining the exemption, GLD told the Commissioner:

"There is a strong element of public interest within the section 42 exemption itself, and the central public interest arguments in favour of maintaining the exemption are those underlying the concept of legal professional privilege itself. There is a clear, strong, and well recognised public interest in allowing clients to seek full and frank advice from their litigation advisers in confidence."

Balance of the public interest arguments

33. In her guidance on section 42¹, the Commissioner describes LPP as 'a fundamental principle of English law'.
34. Of relevance in this case, the Commissioner's guidance on the public interest test² states:

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

² https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

"As a general rule there is no inherent public interest in class based exemptions. However, there is an inherent public interest in section 42, which exempts legally privileged information. This is because of the importance of the principle of legal privilege; disclosing any legally privileged information threatens that principle".

35. Similarly, her guidance on section 42 states:

"The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice".

36. In *Bellamy* the principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the information sought. Explaining the balance of factors to consider when assessing the public interest test, it said:

"... there is strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".

37. In balancing the opposing public interest factors under section 42 in this case, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.

38. Although she considers there will always be an initial weighting towards maintaining the exemption, the Commissioner recognises that there is a public interest in disclosing information that enhances transparency and allows scrutiny of a public authority's role. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.

39. She recognises that additional weight may be added to the above factors in favour of disclosure if the following issues are relevant in the particular case:

- a large amount of money is involved;

- whether or not a significant group of people are affected by the advice or resulting decision;
 - lack of transparency in the public authority's actions;
 - misrepresentation of advice that was given;
 - selective disclosure of only part of advice that was given.
40. The Commissioner also acknowledges that additional weight in favour of maintaining the exemption may be added in cases where the advice is recent, live and/or protects the rights of individuals.
41. She also considers it important to take into account the significance of the actual information and what it reveals.

Conclusion

42. In reaching a conclusion in this case, the Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.
43. In the absence of any public interest arguments put forward by the complainant, the Commissioner has nevertheless taken into account the general arguments that favour disclosure.
44. In reaching her decision, the Commissioner has also considered the stated position of the GLD. She has noted that the advice was recent at the time of the request and has considered the significance of the actual information and what it reveals. She has also taken into account the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.
45. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions. However, she must also take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets. These long-established rules exist to ensure people are confident they can be completely frank and candid with their legal adviser when obtaining legal advice, without fear of disclosure.
46. In all the circumstances of this case, the Commissioner does not consider that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.

47. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of the FOIA for legal advice privilege has been correctly applied.

Right of appeal

48. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.

50. 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

Laura Tomkinson
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