

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2023

Public Authority: Post Office Limited
Address: Ground Floor
Finsbury Dials
20 Finsbury Street
London
EC2Y 9AQ

Decision (including any steps ordered)

1. The complainant has requested information from the Post Office in relation to the 2016 Swift Review. The Post Office refused to provide the requested information, citing section 42 of FOIA – legal professional privilege.
2. The Commissioner's decision is that the Post Office has correctly relied on section 42(1) of FOIA to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 18 September 2022, the complainant wrote to the Post Office and requested information in the following terms:

"In response to FOI2022/00062, Post Office disclosed the 2016 Swift Review.

At paragraph 138 of this review, reference is made to two documents produced for POL by Deloitte in May and June 2014, entitled 'Horizon: Desktop Review of Assurance Sources and Key Control Features' and an accompanying 'Board Briefing'.

I would be most grateful if you would disclose both of these documents.”

5. The Post Office responded on 17 October 2022, advising it needed a further 20 days to respond to the request.
6. On 15 November 2022, the Post Office responded and advised that it was relying on section 42 of FOIA – legal professional privilege.
7. Following an internal review the Post Office wrote to the complainant on 14 December 2022. It stated that it upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 27 February 2023, to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of this complaint is to determine whether the Post Office was entitled to rely on section 42(1), when refusing this request.

Reasons for decision

Section 42(1) – Legal Professional Privilege

10. Section 42(1) of FOIA 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. Legal professional privilege protects the confidentiality of communications between a lawyer and client.
11. The Commissioner’s guidance on section 42(1) explains that such privilege includes that information which has been created for use in preparing a case for litigation. As such, it can apply to a wide variety of information including advice, correspondence, notes, evidence or reports.
12. In this case, the complainant has requested two documents which have been referred to in the Swift Review of 2016. The complainant argues that group litigation proceedings were not initiated against the Post Office with regard to its Horizon issues until April 2016. They have gone on to explain that the documents they have requested, are referred to in detail within the Swift Review, which has already been disclosed by the Post Office.

13. The Post Office has explained that the documents in question were created on the instructions of the Post Office's General Counsel at the time, as there was a strong likelihood of legal action being taken against it. It explained that this was in response to an independent report prepared by a firm of forensic accountants and the subsequent mediation scheme was put into place.
14. The Post Office has also explained that the documents state, "Privileged in contemplation of litigation". It went to advise that whilst the reports were created in 2014, the underlying issues are still live and the proceedings of the Post Office Horizon IT Inquiry is an example of ongoing legal proceedings.
15. The Post Office has advised that it is mindful that part of the information contained within the report was referenced in a report instigated by the Post Office's Chairman in 2015, which has subsequently been released under a different FOIA request. However, only a small portion of the overall report was released and it was not, in itself, detailed enough to draw any conclusions as to the remainder of the withheld report.

Public interest test

Arguments in favour of disclosure

16. The complainant has argued that there is a public inquiry into the issue, and the public interest in the Post Office's decision, and the information upon which it based those decisions, is intense.
17. The complainant went on to state that they believe the public interest far outweighs the Post Office's decision to uphold section 42 of FOIA.
18. The Post Office has explained that the litigation that was anticipated in 2014, was realised in 2017 with the instigation of the Group Litigation Order, which was eventually settled by the Post Office in 2019. Following the settlement, a public inquiry was initiated by the government, which formally became a statutory inquiry in June 2021. The Post Office recognises that there is a considerable public interest in these.
19. The Post Office has explained that disclosure of the information would restore trust and being transparent in its dealings with Postmasters and its service to the public is a strong principle that it applies to all FOIA requests.
20. The Post Office went on to explain that disclosure of the information contained in the report and board briefing would give assurance that concerns raised in respect of Horizon processing controls were contemporaneously considered.

Arguments in favour of maintaining the exemption

21. The Post Office has stated that there is the inherently strong public interest in maintaining the principle of confidentiality between a client and its advisers.
22. The Post Office also considered whether, if the information were to later be disclosed during the course of the ongoing Public Inquiry, the public interest would be best served in disclosing now. However, it remains that the information is privileged and should not be disclosed, but recognises that the Inquiry will likely examine many, if not all, of the issues covered by this information.
23. The Post Office considers that the Inquiry is best placed to determine failings and identify solutions and, therefore, the Post Office believes that any public interest in disclosing the content of these documents, will be met by allowing the Inquiry to complete its work and in accordance with its timescales.
24. The Post Office explained that it took into consideration the potential impact on other privileged information, should the Post Office waive privilege in this instance. It advises that it considered that there is a strong likelihood of a collateral waiver inadvertently occurring to several other reports and/or pieces of legal advice, if the documents covered by this request were to be disclosed.
25. The Post Office says that it considers the inherent public interest in protecting the privilege attached to ancillary information from being harmed by the release of this information, outweighs the public interest in its disclosure.

Commissioner's position

26. The Commissioner has considered the arguments from both the complainant and the Post Office.
27. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that communications will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.

28. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in the *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

“...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it”

29. The Commissioner considers that the balance of public interest lies in withholding the information and protecting the Post Office's ability to collate that information necessary to either give or obtain legal advice, or to use in preparing a case for litigation, without the fear of premature disclosure. The Commissioner has also considered the Post Office's arguments in relation to how the release of such information could have an impact on additional information, if it were to be released.

30. The Commissioner is not aware of any public interest arguments that are enough to outweigh or override the inbuilt public interest in the information remaining protected by legal professional privilege.

31. The Commissioner has concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. Therefore, the Post Office has correctly applied section 42(1). The Commissioner requires no further action to be taken by the Post Office in relation to this request.

Right of appeal

32. 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

33. 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.
34. 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

Michael Lea
Team Manager
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Wycliffe House
Water Lane
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