

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2023

Public Authority: Department for Business and Trade

Address: Old Admiralty Building

London

SW1A 2DY

Decision (including any steps ordered)

1. The complainant has requested information regarding the Information Commissioner's decision notice Reference: FS50066313. The Department for Business and Trade (the DBT) refused the request, citing section 42(1) (Legal Professional Privilege) of FOIA.
2. The Commissioner's decision is that the DBT were entitled to rely on section 42(1) of FOIA and the balance of the public interest favours maintaining that exemption.
3. The Commissioner requires no steps to be taken as a result of this decision.

Background information

4. The withheld information is historical correspondence between the DBT's predecessor department the DTI and their legal representatives dating back to 2005.

Request and response

5. On 23 April 2023, the complainant made the following request for information to the DBT:

"I request disclosure of some of the material in Information Commissioner decision notice number Reference: FS50066313. See here

<https://ico.org.uk/media/action-weve-tak...>

this request comprises only the following: -

- (a) the brief and evidence provided to Treasury Counsel
- (b) the opinion of Treasury Counsel, including any notes of meetings or telephone conversations, e-mails and letters both before and after the opinion was given. the original request was made to the DTI. If another dept. has replaced the DTI, please indicate which the correct new dept."

6. On 23 May 2023, the DBT refused the request, citing section 42(1) to withhold the requested information.
7. The DBT upheld its decision at internal review on 4 July 2023.

Scope of the case

8. The complainant contacted the Commissioner on 6 July 2023 to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation, the DBT maintained their reliance on the exemption under section 42(1) and confirmed they consider that even after the period of time that has elapsed since the original decision upheld by the ICO, the exemption at section 42(1) is still relevant today.
10. The scope of the Commissioner's investigation is to consider whether the DBT were entitled to withhold information relevant to the request.

Reasons for decision

Section 42(1) – Legal professional privilege

11. 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.
12. In this case, the complainant has requested correspondence related to advice given to the then DTI by their legal representative at the time with regard to a specific business. The Commissioner has had sight of the withheld information previously, which comprised communications between the DTI and its legal advisor. The Commissioner is satisfied that the information comprises confidential communications between a lawyer and client for the sole or dominant purpose of providing legal advice. This means, therefore, that the information is subject to legal professional privilege, the Commissioner has considered the passage of time and whether this may have diminished. The Commissioner is aware of no evidence suggesting that this privilege has been waived. The exemption provided by section 42(1) of the FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.
13. 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. Any weakening of the confidence that parties have that legal advice 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.
14. 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."

15. The complainant has said that: "The request is made in order that the IC can clarify what effect the passing of time has on the exemption claimed. I do not agree that the LPP exemption carries 'inbuilt weight'. Qualified exemptions cannot carry inbuilt weight for the same reason they cannot carry inbuilt weakness. DBERR was wrong. I want the IC to state if the level of public interest level in ordering release of information is the same as in non-FOIA, i.e. private law proceedings."
16. Given the above, the Commissioner considers the passage of time can have an effect on the potential release of information, however, there is no evidence to suggest that the passage of time has weakened the original and current arguments for the engagement of section 42(1), therefore the arguments still stand. Section 42 does irrevocably include the inbuilt weight due to the manner of the privilege itself, therefore the argument is moot in this case. Unlike information being made available to a court for proceedings, disclosure under FOIA is disclosure to the world, i.e., not to a specific individual or individuals.
17. The Commissioner accepts that there will always be a public interest in transparency, accountability and in members of the public having access to information to enable them to understand more clearly why particular decisions had been made and certain processes followed.
18. However, in this case the Commissioner considers that the balance of public interest lies in withholding the information and protecting the DBT's ability to obtain free, frank, high-quality legal advice without the fear of disclosure. The Commissioner is not aware of any public interest arguments that are strong enough to outweigh or override the inbuilt public interest in the information remaining protected by legal professional privilege. In this case, although the complainant may have an interest in the disclosure of the requested information, there is no evidence of a wider public interest.
19. The DBT brought to the Commissioner attention a previous tribunal hearing for context: Crawford v Information Commissioner & Lincolnshire County Council EA/2011/0145.
20. In this tribunal, it makes it clear that, when challenging the engagement of this exemption, a requester or complainant needs to provide clear, compelling and specific public interest grounds justifying disclosure.

"Our starting point, therefore, is that the exemption is qualified, not absolute, but that Mrs Crawford must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute..." and it concluded: "In the circumstances

Mrs Crawford has not persuaded us that the factors she relies on give rise to a public interest that equals or outweighs the public interest in maintaining the section 42 exemption.”

21. This principle is set out in the ICO guidance on this exemption. In DBT’s view, no such arguments in favour of disclosure have been presented to the department, by the complainant, through the course of the request and internal review.
22. The Commissioner has concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. Therefore, the DBT were entitled to apply section 42(1) of FOIA in this case.

Right of appeal

23. 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

24. 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.
25. 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

Deirdre Collins
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