

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 12 February 2007

Public Authority: Commission for Patient and Public Involvement in Health
(CPPIH)

Address: 7th Floor
120 Edmund Street
Birmingham
B3 2ES

Summary

The complainant requested the public authority to disclose information concerning its instructions to a firm of solicitors in relation to a particular matter. The public authority provided some of the information but not all of it relying upon section 42 of the Freedom of Information Act 2000 (legal professional privilege) in respect of the balance. The Commissioner has reviewed the information in question and is satisfied that the public authority has applied the section 42 exemption correctly to part of the information only. The public authority is accordingly directed to disclose the part of the information which he does not accept as being covered by the exemption in section 42. The Commissioner also finds that the public authority is in breach of section 17 of the Act. Complaint partially upheld.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 6 September 2005 the complainant requested the following: "*1. Who or which committee or group authorised expenditure of public moneys on the engagement of Hill Dickinson solicitors to write to an individual member of the public namely myself in threatening terms. 2. If a committee or group the names of the persons comprising that committee or group. 3. Copies of all correspondence including e mails and minutes of meetings relating to that decision*".

3. On 15 September 2005 the public authority responded declining to release the information relying upon the section 42 exemption.
4. On 28 September 2005 the complainant requested an internal review.
5. On 24 October 2005 the public authority confirmed that the internal review had taken place and that the original decision had been upheld on the same ground.

The Investigation

Scope of the case

6. On 3 November 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider that it would be in the public interest for the information to be provided.

Chronology

7. On 1 August and 4 August 2006 the Commissioner contacted the public authority in order to clarify its use of section 42 raising a question about which privilege it was claiming. The public authority responded on 4 August 2006 stating it was claiming litigation privilege.
8. The Commissioner has considered all the information and arguments provided by both parties, including the exempt information.

Findings of fact

9. The Commissioner reviewed the information provided in this case within the following background context.
10. In June 2005 the complainant set up a website to allow him to monitor the progress of Patient and Public Involvement in Health (PPI). The website included an article by the complainant "Suitable Jobs for Suitable People" which alleged that senior managers in the Commission for Patient and Public Involvement in Health had presided over "*incompetence and equivocality in PPI*".
11. In August 2005 the complainant received a letter from Hill Dickinson solicitors claiming the statements he had published were defamatory in nature and that if he persisted, the public authority would take legal action against him.
12. In September 2005 the complainant was contacted by the website host which informed him that it could not continue hosting his site for legal reasons as it had been sent a letter from Hill Dickinson.

Analysis

13. The Commissioner will now deal with this case by firstly considering the matter of a procedural breach and secondly, considering the public authority's use of the section 42 exemption, including its application of the public interest test. A full text of the relevant statutes referred to is contained in the legal annex.

Procedural matters

14. Section 17 of the Act provides that where a request for information is refused upon the basis of an exemption, the public authority must explain what exemption or exemptions have been relied upon. Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon. Although the public authority did state which exemption it sought to rely upon the Commissioner is of the view that it did not state with sufficient clarity why the withheld information fell under the terms of the exemption under section 42.
15. The public authority was required by virtue of section 17(3)(b) of the Act to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The public authority did not demonstrate any consideration of the public interest arguments in favour of disclosure and non-disclosure of the requested information.
16. Further the public authority was required by virtue of sections 17(7)(a) and (b) to provide particulars of any procedure it had for dealing with complaints about the handling of requests for information and of the complainant's right to appeal to the Commissioner under section 50 of the Act. The public authority did not provide these details.
17. Accordingly the Commissioner finds that public authority has failed to meet the obligations imposed upon it by section 17 of the Act.

Exemptions

Section 42 - Legal professional privilege

18. The section 42 exemption applied by the public authority relates to information to which a claim to legal professional privilege could be maintained. Such information is exempt information.
19. The principle of legal professional privilege can be described as a set of rules or principles 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. It also includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.

20. There are two separate categories within this privilege known as advice privilege and litigation privilege.
21. Advice privilege covers communications between a person and her/his lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
22. Litigation privilege arises where litigation is contemplated or is in fact underway. Where this is the case privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of proposed or on-going litigation. This includes communications between a professional legal adviser and her/his client, communications with third parties made for the purpose of assisting the client's case for example expert opinion and may cover a variety of documents.
23. The Commissioner has considered the requested information which consists of fifteen items made up of letters (including two draft letters), faxes and e-mails. After a careful evaluation of these items, he has concluded that two items out of the fifteen submitted attract legal professional privilege.
24. The two items that attract legal professional privilege consist of:
 - a) a fax dated 27 July 2005 from the public authority to its legal adviser and
 - b) an e-mail dated 30 August 2005 from the legal adviser to the public authority with two draft letters attached.
25. Both of these communications (including the two draft letters) are between a client and his/her legal adviser for the sole purpose of obtaining or giving legal advice and clearly fall within the category of advice privilege. For the purposes of clarity these two items will be referred to as Privilege Information.
26. The legal professional privilege exemption is class based which means it is not necessary to demonstrate that any prejudice may occur to the professional legal adviser/client relationship if information is disclosed. Instead it is already assumed that the disclosure of any information might undermine the relationship of the lawyer and client.
27. As this exemption is also a qualified exemption, section 2 of the Act requires the Commissioner to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
28. Although the public authority has failed to provide any details of its application of the public interest test the Commissioner considers factors in favour of disclosure include the transparency of a public authority's decision making process and the benefit to individuals of the provision of information of particular reference to them.
29. However the Commissioner also accepts that confidentiality between lawyer and client promotes respect for the rule of law by encouraging clients to seek legal advice. It also allows for full and frank exchanges between clients and their

lawyers. Without confidentiality clients might fear that anything they said to their lawyers, however sensitive or potentially damaging, could be revealed. They might be deterred from seeking legal advice at all or from disclosing all the relevant material their lawyers. In turn this could lead to advice being given that might not be as full and frank as it ought to be.

30. The Information Tribunal has upheld this view. In its decision in *Bellamy v Information Commissioner* (appeal no: EA/2005/0023, FS006313) the Tribunal stated in paragraph 35 that: "... there is a 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 ... It may well be that ... where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight ... Nonetheless, it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case".
31. The Commissioner finds that in this case the public interest in maintaining the exemption in respect of the Privilege Information, outweighs the public interest in disclosing it.
32. The Commissioner is of the view that the public authority was wrong to apply the section 42 exemption to the remaining thirteen items.
33. For the purposes of clarity these thirteen items will be referred to as General Information and consist of:
 - a) an e-mail dated 9 June 2005 from one public authority employee to two other employees none of which were legal advisers therefore advice privilege would not apply. Although the e-mail referred to the article published by the complainant there was no evidence that any litigation was in contemplation therefore litigation privilege would not apply.
 - b) an e-mail dated 10 June 2005 from the service provider to the complainant and the public authority. As the complainant was a recipient of this e-mail privilege would not apply.
 - c) an e-mail dated 10 June 2005 which formed part of an e-mail chain. The e-mail of the 10 June 2005 was from the public authority to the complainant in response to an e-mail also dated 10 June 2005 from the complainant to the public authority. As the complainant was the author of one of the e-mails and a recipient of the other e-mail privilege would not apply in either case.
 - d) an e-mail dated 10 June 2005 from the service provider to the complainant attaching an e-mail chain of an e-mail from the complainant to the public authority and copies to the service provider and the public authority.
 - e) an e-mail dated 11 June 2005 from the complainant to the public authority. As the complainant was the author of the e-mail privilege is not relevant.

- f) an e-mail dated 13 June 2005 from the service provider to the complainant and the public authority.
- g) a letter from the public authority to the complainant. As the complainant is the recipient privilege is not relevant.
- h) an e-mail dated 25 July 2005 from the first subject of the complainant's article to the second subject of the complainant's article, attaching an e-mail chain of correspondence between both of these employees, about the article. Both subjects are employees of the public authority. In the Commissioner's view, this email does not attract advice privilege as the correspondence was not between the public authority and its legal adviser. Although the first subject raises the possibility of a defamation action in order for litigation privilege to apply, the public authority would have to be able to show that the correspondence entered into to when litigation is in contemplation, came into existence for the sole or dominant purpose of either giving or getting legal advice from a legal adviser with regard to litigation or collecting evidence for use in the conduct of the litigation. Neither of the conditions were satisfied in relation to this correspondence therefore no claim to litigation privilege can be made in respect of this e-mail.
- i) a letter dated 24 October 2005 from the public authority to the complainant. As the complainant is the recipient of the e-mail privilege does not apply.
- j) a letter dated 12 February 2006 from the complainant to the public authority. As the complainant is the author of the e-mail privilege is not relevant.
- k) a letter dated 27 February 2006 from the public authority to the complainant. As the complainant is the recipient of the letter privilege is not relevant.
- l) a draft letter dated 26 August 2005 sent to the public authority from its legal adviser. Initially this attracted advice privilege as it was a confidential communication sent from the legal adviser to the public authority for the sole or dominant purpose of obtaining legal advice. However once the letter was sent to the complainant privilege is not relevant.
- m) a draft letter dated 26 August 2005 sent to the public authority from the legal adviser. Initially this attracted advice privilege as it was a confidential communication sent from the legal adviser to the public authority for the sole or dominant purpose of obtaining legal advice. However once the letter was sent to the service provider it no longer attracted privilege as third parties can be only covered if litigation is either contemplated or in progress and the third party is assisting the client's case. This was not the case in this instance.

34. Most of these communications are either from the complainant to the public authority or from the public authority to the complainant therefore privilege is not relevant.
35. However it is the Commissioner's view that although the public authority did not cite the section 21 exemption, it could have been applied it to the following items found in General Information: (b), (c), (d), (e), (f,) (g), (i), (j), (k), (l), and (m).

Section 21 (Information accessible to applicant by other means)

36. Section 21 applies to information that is accessible by other means. It is an absolute exemption therefore the public interest does not have to be considered. As the complainant was the author of some of the correspondence and the recipient of some of the correspondence in the General Information, he arguably already had access to this information. If the public authority had provided evidence of what information the complainant held at the time of the request then it could have applied the section 21 exemption to that specific information.

The Decision

37. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - the application of the section 42 exemption correctly to the information known as the Privilege Information as defined in paragraph 24.
 - However, the Commissioner has also decided that the public authority was in breach of section 17 as referred to in paragraphs 14 – 17.

Steps Required

38. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose items (a) - (m) as identified in paragraph 33 to the complainant.
39. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

40. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 12th day of February 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annexe

Section 2(2)(b) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 17(3)(b) provides that -

“A public authority which ... is to any extent relying on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

Section 17(7) provides that –

“A notice ... must contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and contain particulars of the right conferred by section 50”.

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”