

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 28th September 2007

Public Authority: Department for Work and Pensions
Address: Caxton House
Tothill Street
London
SW1H 9DA

Summary Decision

The complainant requested information relating to the consideration by the Department for Work and Pensions (“the DWP”) of the compliance with the Human Rights Act 1998 of the Pensions Act 2004 in relation to the Financial Assistance Scheme and the Pension Protection Fund.

The Commissioner finds that the DWP was correct to withhold the information under section 42 (legal professional privilege) of the Act. The Commissioner has not considered whether the DWP was correct to withhold the information under section 35 of the Act as the information is exempt under section 42.

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 in respect of the complainant’s request.

The Request

2. The complainant wrote to the DWP on 13 September 2005 requesting information:

“I would be pleased if [name] could advise me, under the provisions of the Freedom of Information Act, and in relation to the 2004 PA and regulations the following:-

 - a) *Who gave advice to government on compliance with HRA 1998?*
 - b) *At what stages was the advice given?*
 - c) *What was the nature of the advice (Could I have a copy of the advice, dated as appropriate.*
 - d) *List of the factors and issues taken into account when considering the advice to be given.”*
3. The DWP wrote to the complainant on 31 October 2005 confirming that it had considered the request under the Act and was withholding the information as it fell into the category of information which was exempt under section 35(1)(a) (formulation and development of government policy) and section 42 (legal professional privilege) of the Act. In this letter, the DWP set out the public interest test and stated that there was no overriding public interest argument in favour of releasing the information. The DWP stated that *“good government depends on good decision making and therefore needs space in which to formulate policies based on the best advice available, with full consideration of all the options.”*
4. In relation to the section 42 exemption the DWP advised that the public interest favoured withholding the information. The DWP stated: *“section 42 ensures that the confidential relationship between lawyer and client is protected. Only in exceptional circumstances would there be a public interest in disclosure, given the very substantial public interest in maintaining the confidentiality of legally professionally privileged material.”*
5. On 7 November 2005, the complainant requested an internal review of the decision and on 6 December 2005 the DWP wrote to the complainant advising that it was upholding the decision to withhold the information in reliance on the exemptions under section 35 and section 42 of the Act.

The Investigation

Scope of the case

6. The complainant wrote to the Commissioner on 29 December 2005 requesting an investigation into the handling of his information request. The Commissioner accepted the complainant's request as a valid complaint under section 50 of the Act and has considered the conduct of this matter by the DWP in relation to that withheld information described at point c) of paragraph 2 above.

Chronology

7. The Commissioner wrote to the DWP on 25 June 2007 requesting a copy of the withheld information.
8. On 26 July the DWP forwarded the withheld information to the Commissioner. The DWP also provided its detailed submissions on its application of the exemptions and its consideration of the public interest. As a result of the Commissioner's intervention the DWP released to the complainant that information requested at points a), b), and d) of his request as set out at paragraph 2 above. The remaining withheld information is set out at point c) of paragraph 2 above.
9. In respect of the withheld information, the DWP set out its public interest considerations in relation to section 42. It advised the Commissioner that its starting position was the presumption that it is generally not in the public interest for the principle of legal professional privilege to be undermined. The following factor was considered to be in favour of disclosure in the public interest:
 - The public interest in transparency of government policy, allowing the public to judge the quality of decisions made in an area which impacts financially on citizens
10. The following factors were considered to favour withholding the information in the public interest:
 - LPP is an established principle of English Law and there is a strong public interest in individuals being able to consult with their lawyers in confidence and being able to share information fully and frankly.
 - Decisions by government need to be taken with a fully informed legal context. Decision makers need to be aware of the possible arguments for and against a particular decision.
 - Possibility of unnecessary legal challenges to legal advice which would result in resources being spent defending them.
 - To safeguard against the risk that lawyers and clients would avoid making or only make a partial record of the advice given.
11. The Commissioner considered the withheld information and the submissions of the DWP and discussed the request with the complainant.

Analysis

Exemptions cited

Section 42 (legal professional privilege)

12. The Commissioner has considered whether the DWP correctly applied the section 42 exemption.
13. For this exemption to be engaged, the Commissioner must be satisfied that a claim to legal professional privilege could be maintained in respect of the requested information. If the Commissioner is satisfied that a claim to legal professional privilege could be maintained he must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

What is legal professional privilege?

14. Legal professional privilege is an important principle of English law established since at least the sixteenth century which provides for special protection from disclosure of communications between lawyers and their clients. In the Information Tribunal case of Mr Christopher Bellamy and The Information Commissioner Appeal Number EA/2005/0023 27 March 2006 the Tribunal described the notion of legal professional privilege as,

“ a set of rules or principles which are designed to protect 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.

15. Legal professional privilege is classified into two categories; legal advice privilege and litigation privilege.
16. Legal advice privilege relates to confidential communications and other documents such as draft statements and reports passing between lawyer and client for the purpose of receiving legal advice in both a litigation and non-litigation context. This means that the information passing between the lawyer and the client may be privileged even though litigation may not be contemplated or in progress. So far as legal advice privilege is concerned, the rationale is the same, whether litigation is contemplated or not. There are two aspects to this:

(i) the public interest in enabling persons to obtain appropriate legal advice and assistance; and (ii) the recognition by the courts that effective legal advice requires absolute candour between a client and his lawyer. The requisite candour is much less likely to exist if their exchanges are liable to be disclosed.”¹

¹ See Bankim Thanki QC, The Law of Privilege, (2006), p8

17. Litigation privilege relates to confidential communications between a client or his lawyer and third parties that have come into existence after litigation is a real prospect or is pending. The sole purpose of the communications must be to give or get advice in relation to the litigation or collect evidence for use in the litigation.
18. Confidentiality is an essential prerequisite to a claim for legal professional privilege. Communications will be confidential if they have taken place in circumstances where a relationship of confidence is express or implied.

Is the legal professional privilege exemption engaged?

19. The Commissioner has viewed the withheld information and can confirm that it consists of confidential communications between the DWP and its lawyers for the purpose of receiving legal advice and is therefore information in respect of which a claim to legal advice privilege could be maintained in legal proceedings. The Commissioner was presented with no evidence that there had been a waiver by the public authority in this instance.

The public interest

20. Section 42 is a qualified exemption which means that once it has been determined that the exemption is engaged further consideration needs to be given to the public interest test as set out at section 2(2)(b) of the Act. Section 2(2)(b) requires the DWP to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information. There is a general presumption in favour of releasing information unless the public authority can show on public interest grounds that the information should not be released. If the public interest factors are equally balanced then the information must be disclosed.

Public interest factors favouring withholding the information

21. The Commissioner recognises that there is a strong public interest in enabling persons to obtain appropriate legal advice and assistance. It is important that members of the public can have frank communications with their lawyers with a high degree of certainty that the exchanges are not liable to be disclosed without consent and used against them. According to Sir Gordon Slynn in *AM&S Europe Ltd v European Commission* (1983)² this public interest,

“springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons real and legal, that they should be able to know what they can do under the law what is forbidden, where they must tread circumspectly, where they run risks.”

² (1983) QB 878, 913

22. It should therefore only be in exceptional circumstances, [e.g. where there has been a waiver of privilege] that privileged legal advice should be disclosed. In the 2006 Bellamy case the Information Tribunal found that at least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest and stated,

“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.”³

23. The DWP argued that government departments need high quality, comprehensive legal advice. It argued that lawyers need to be able to present the full picture to the public authority including arguments in support of their final conclusions and relevant counter arguments. It further argued that legal advice often set out a perceived weakness in the public authorities position and there was therefore a potential risk that lawyers would avoid making, partially record legal advice or at worst avoid seeking legal advice all together for fear that disclosure would result in legal challenges.
24. The Commissioner accepts this to be a public interest factor favouring the withholding of the information requested as defending unnecessary legal challenges can prove very costly for the public purse.

Public interest factors favouring the release of the information

25. The DWP argued that there was no clear case to suggest that the strong public interest in maintaining the legal professional privilege should be overturned and failed to identify any public interest factors which favoured disclosure. The Commissioner considers that there is a public interest in transparency in decision making by a public authority. Public confidence is necessarily dependent on such transparency and on the demonstration by a public authority that it has satisfied all applicable laws and acted with clear probity. Section 6 of the Human Rights Act 1998 (HRA) makes it unlawful for a public authority to act in a way which is incompatible with the European Convention on Human Rights (ECHR). In November 2004 the Pensions Act was enacted including provisions for the Pension Protection Fund and the Financial Assistance Scheme. Certain members of wound up pensions schemes, run by solvent companies, found that they were not afforded protection by the Financial Assistance Scheme. It was argued by some that this removed the protection given to such pension scheme members under the 1995 Pensions Act and that this was contrary to the Human Rights Act in that it was contrary to the right to protection of property under Article 1, Protocol 1 of the European Convention on Human Rights.
26. The Commissioner recognises that there is a clear public interest in improving the accountability of the public authorities for the decisions they take, and the legal

³ Christopher Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry, 27.03.2006 appeal number EA/2005/0023

advice upon which the DWP make decisions would clearly add to the public debate surrounding any compatibility issues.

27. On balance, however, whilst the Commissioner considers there are strong public interest arguments favouring the release of the information, these are not strong or exceptional enough to override the long established doctrine of legal professional privilege. The Commissioner therefore concludes that the public interest favours the maintaining the exemption under section 42. The Commissioner has also taken into account the fact that it would not be necessary to view the legal advice requested in order to challenge the DWP if it was considered to be acting in a manner incompatible with the Human Rights Act 1998.

Section 35 Exemption

28. The Commissioner has concluded that the withheld information is exempt by virtue of section 42 of the Act and has not therefore determined whether the withheld information is exempt by virtue of section 35 of the Act.

The Decision

29. The Commissioner's decision is that the DWP was entitled to refuse to provide the withheld information on the basis that the withheld information was exempt under section 42 of the Act.

Steps required

30. In light of his findings on the application of the exemption under section 42 the Commissioner does not require any steps to be taken.

Right of Appeal

31. 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

Dated the 28th day of September 2007

Signed

Marie Anderson
Assistant Information Commissioner

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

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

2. **Section 10** provides that:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

3. **Section 17** provides that:

(1) A public authority which ... is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

4. **Section 42** provides that:

(1) 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.