

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 24 January 2007

Public Authority: British Broadcasting Corporation
Address: MC3 D1
Media Centre
Media Village,
201 Wood Lane
London
W12 7TQ

Summary

The complainant requested information in respect of the public authority's legal advice concerning the compliance of the procedures for collecting the Television Licence fee with the Human Rights Act. The public authority refused the information request on the grounds that the information requested is subject to a claim of legal professional privilege under section 42 of the Act and that the public interest in maintaining the exemption outweighs the public interest in disclosure. In this case the Commissioner finds that section 42 applies and that the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore, in so far as the public authority correctly applied the exemption under section 42 of the Act, it has complied with its obligations under section 1(1).

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 March 2005, the complainant made the following information request:

"With regard to human rights and civil liberty legislation, under the Freedom of Information Act, would you please provide your legal advice that shows what your policy confirms."

3. The public authority received the information request on 14 March 2005 and responded on 13 April 2005. This response confirmed that legal advice had been received on the issue of the compliance of the licence fee with the Human Rights Act (the "HRA") and that a record of this advice had been retained. However, this information was withheld with the public authority citing section 42 and explaining that this information was subject to a claim of legal professional privilege.
4. The public authority went on to refer to its consideration of the public interest test. The public authority quoted the following from guidance produced on this issue by the Department for Constitutional Affairs:

"given the very substantial public interest in maintaining the confidentiality of LPP material it is likely to be only in exceptional circumstances that it will give way to the public interest in favour of disclosure."
5. The public authority indicated that it did not consider there to be exceptional circumstances in this instance and so the public interest in maintaining the confidentiality of the legal advice they had received was substantial. The public authority also referred to court cases where the legality of the licence fee has been upheld.
6. The complainant contacted the public authority by letter dated 26 July 2005. In this letter, the complainant asked for an internal review of the handling of his information request. The complainant also stated that he felt strongly that the procedures used in the collection of the licence fee were not compliant with the HRA and that he doubted the existence of legal advice that confirms that these procedures do comply with the HRA.
7. The public authority responded, giving the outcome of the internal review, on 1 November 2006. This response upheld the refusal of the information request under section 42.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 3 January 2006 to complain about the handling of his information request. The complainant stated that he was unconvinced of the legality of the methods used to verify that he does not have a television and did not accept that the public interest favoured the withholding of this information.
9. The Commissioner accepted the complainant's request as a valid complaint under section 50 of the Act and therefore undertook to review the way in which the public authority dealt with the complainant's request.

Chronology

10. The complainant was contacted on 1 September 2006. In this letter, the complainant was advised that the public authority would be contacted in connection with his complaint and that he should expect to hear further about this in due course.
11. The Commissioner contacted the public authority on 1 September 2005. In this letter, the public authority was asked to provide copies of the information withheld and further clarification in respect of why it believes that the exemption is engaged and why the public interest favours the maintenance of the exemption.
12. To this end, the public authority was asked to clarify if the privilege in question was advice or litigation privilege. The public authority was also asked to confirm the following:
 - (i) The person giving the advice is legally qualified and if so what are his/her qualifications?
 - (ii) The advice was provided in a professional legal capacity?
 - (iii) The communication was made for the principal or 'dominant' purpose of seeking or giving legal advice?
13. The public authority responded on 29 September 2006. Its responses to the above were as follows:
 - (i) The advice was provided by qualified barristers.
 - (ii) The advice was provided in a professional legal capacity, as demonstrated by the contents of the withheld documents, which were enclosed with the public authority's response to the Commissioner.
 - (iii) The communications were for the principal purpose of giving legal advice, again as demonstrated by the contents of the withheld documents.
14. The public authority clarified that the information withheld is considered subject to a claim of advice privilege. This is because the advice was provided in order to ensure compliance with the HRA. The advice was not taken in relation to any pending or prospective litigation and so is not subject to a claim of litigation privilege.
15. The public authority went on to give its arguments as to why it believes that the public interest favours the maintenance of the exemption and thus withholding of the information. These arguments were as follows:
 - There is a strong public interest in maintaining the confidentiality of communications between client and legal adviser. Reference was made to guidance produced on this issue by the Department for Constitutional Affairs. This guidance refers to the likelihood that the public interest is only likely to favour disclosure of information subject to legal professional

privilege in exceptional circumstances. The public authority does not believe that exceptional circumstances exist in this case.

- Legal advice should be comprehensive; if the legal adviser or client were unsure whether their exchanges were to remain confidential, this may lead to only partial advice being provided. If this had a detrimental effect on a publicly funded organisation such as the public authority, this would be counter to the public interest. It is, therefore, in the public interest for legal advice to remain confidential in order that the public authority can operate effectively.
 - The public authority recognised that there was a public interest argument in favour of disclosure of the information in being able to demonstrate that the procedures for collection of the licence fee are compliant with the HRA. However, the public authority believes that this argument is weakened due to previous court cases where the legality of the licence fee collection procedures have been established.
16. The Commissioner contacted the public authority again on 18 October 2006 for clarification concerning the documents withheld. This clarification was necessary in order to verify that the contents of the withheld documents were for the primary purpose of providing legal advice to the public authority.
17. The public authority responded on 20 October 2006. In its response, the public authority provided the necessary further information to enable the Commissioner to verify whether the withheld documents were for the primary purpose of providing legal advice.

Findings of fact

18. The public authority does hold information that falls within the scope of the information request.
19. The public authority believes that the section 42 exemption is engaged and that the public interest favours maintaining the exemption.
20. The complainant believes that the information withheld should be provided to him and does not accept that the public interest favours maintaining the exemption and therefore the withholding of the information.

Analysis

Exemption

21. The section 42 exemption applied by the public authority relates to information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. Such information is exempt information.
22. In general the principle of legal professional privilege can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between client and lawyer, 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 third parties if such communications or exchanges come into being for the purposes of preparing for litigation. There are two separate categories within this privilege; legal advice privilege and litigation privilege. Again in general terms the former covers communications relating to the provision of legal advice, whereas the latter, as the term suggests, encompasses communications which might include exchanges between those parties, where the sole or dominant purpose of the communications is that they relate to any litigation which is already in existence or which might be in contemplation.
23. When considering the application of an exemption, it is necessary to firstly consider whether the information withheld falls within the scope of the exemption. In this case, the public authority has claimed advice privilege in respect of the information withheld. The Commissioner therefore first considered whether a claim to legal professional privilege (namely advice privilege) could be maintaining in legal proceedings in respect of the information requested in this case.
24. On review of the information requested in this case the Commissioner is satisfied that the advice provided was given by qualified solicitor(s) and addressed to their client, the public authority for the purposes of seeking or obtaining legal advice. The legal professional privilege exemption is class based. Therefore, for the exemption to apply, it is not necessary to demonstrate that any prejudice may occur to the professional legal adviser / client relationship if information is disclosed. Rather it is assumed that the disclosure of even quite trivial information might undermine this relationship.
25. However the exemption under section 42 is not an absolute exemption. Therefore where the information falls within the terms of the exemption as it does here, section 2 of the Act requires the public authority 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.

The Public Interest

26. There is a strong element of public interest inbuilt into legal professional privilege, which must be taken account of when considering the application of section 42. In the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal observed that “there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned.” (paragraph 8)

27. In summing up, it stated 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 concluded that “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 cut case...” (paragraph 35)
28. The decision cites three cases in which legal professional privilege is discussed and references more. In summary, legal professional privilege is referred to as being “a fundamental condition” of justice and “a fundamental human right”, not limited in its application to the facts of particular cases. The inbuilt public interest is said to override the public interest in relevant material being available to courts. (paragraphs 10 and 11)
29. Despite the public interest inherent in the concept of legal professional privilege, it is important to remember that section 42 is qualified. This allows for the possibility of some cases where the public interest in disclosing requested information does override the public interest in maintaining the exemption.
30. The complainant argued that the public authority, as a publicly funded organisation, should be required to demonstrate that its procedures are compliant with relevant legislation through the disclosure of the requested information. The public authority also recognised this as an argument in favour of disclosure.
31. However, the Commissioner notes that the procedures of the public authority for the collection of the licence fee have previously been subject to challenge through the courts. The outcome of these court cases has established the legality of these procedures. That these procedures have been tested in court weakens the argument that information about these procedures should be released in order to demonstrate legality.
32. The Commissioner does not believe that in this case the circumstances are sufficiently exceptional to justify disclosure of the information. In the absence of exceptional circumstances and attendant strong public interest in the disclosure of this information, the Commissioner believes that the public interest favours the maintenance of the exemption under section 42.

The Decision

33. The Commissioner’s decision is that the public authority dealt with the request for information in accordance with the Act in that section 42 was correctly applied.

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. 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@tribunals.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 24 day of January 2007

Signed

**Richard Thomas
Information Commissioner**

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