

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 30<sup>th</sup> August 2007

**Public Authority:** Department for Work and Pensions  
**Address:** The Adelphi  
1-11 John Adam Street  
London  
WC2 6HT

### Summary

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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 clauses in the then Child Support, Pensions and Social Security Bill introduced into Parliament in January 2000. The complainant also requested information relating to the consideration of compliance with the Human Rights Act 1998 of the new child support scheme in March 2003. The Commissioner finds that the DWP delayed in issuing a refusal notice, which stated that it was withholding the information under section 35 and section 42 of the Freedom of Information Act 2000 ("the Act") and therefore breached section 17 of the Act. The Commissioner also 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

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1. The Commissioner's role 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 Act. This Notice sets out his decision.

### The Request

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2. The complainant wrote to the DWP on 21 November 2005 requesting,  
  
"The full review of your legislation, policies and procedures that satisfied your Agency that it is compatible with the Human Rights Act. I make this request for this review and any reports that refer to the fact that your client's Human Rights

are not being infringed regarding the running of parallel statutes; ie existing clients on the old calculation of maintenance and new clients on the new calculation.”

3. The DWP acknowledged this request in writing on 28 November 2005 and sent a further letter on 22 December 2005 informing the complainant that it was still in the process of gathering information. On 29 December 2005 the DWP wrote to the complainant requesting refinement of the request as the request was too broad in nature and would exceed the disproportionate cost limits. The DWP suggested refinements and on 9 January 2006 the complainant confirmed by telephone that he wished to refine his request to the following:
  - “(i) papers relating to the consideration of the compliance with the Human Rights Act 1998 of Clauses in the then Child Support, Pensions and Social Security Bill, introduced into Parliament in January 2000;
  - (ii) Papers relating to any consideration of the compliance with the Human Rights Act 1998 of the decision to introduce the new child support scheme in March 2003 for certain cases only.”
4. The DWP wrote to the complainant on 24 January 2006 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 (formulation 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 overarching public interest argument in favour of releasing the information. In relation to the section 35 exemption 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.” In relation to the section 42 exemption the DWP advised that the public interest favoured withholding the information as some of the information requested would be subject to privilege in the event of court proceedings.
5. On 31 January 2006, the complainant requested an internal review of the decision and on 28 February 2006 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**

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### **Scope of the case**

6. The complainant wrote to the Commissioner on 6 April 2006 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.

## Chronology

7. The Commissioner wrote to the DWP on 27 April 2007 requesting a copy of the withheld information and on 23 May 2007 the DWP forwarded the withheld information to the Commissioner. The Commissioner considered the alleged withheld information and then forwarded a detailed letter to the DWP on 1 June 2007. In this letter the Commissioner requested an explanation as to why the DWP delayed in refusing the request. The Commissioner also queried the use of the exemptions by the DWP to withhold the information. The Commissioner asked the DWP to confirm which specific documents the DWP considered contained information relating to the formulation of government policy. In relation to the section 42 exemption (legal professional privilege) the Commissioner asked the DWP to specify which documents it considered to be exempt on the grounds of legal privilege and why it considered this to be the case. The Commissioner asked the DWP to specify whether the legal privilege was legal advice privilege or litigation privilege and to confirm were appropriate that the legal advice was given by a person in a professional legal capacity. Finally, the Commissioner asked the DWP to apply the public interest test.
8. On 21 June 2007, The DWP wrote to the Commissioner explaining that unfortunately the material which had been forwarded to the Commissioner on 23 May 2007 did not relate to the complainant's FOI request and had been sent in error. The DWP apologised for the oversight and forwarded the correct information which was relevant to the request.
9. The DWP further wrote to the Commissioner on 28 July 2007 attaching a schedule in relation to the withheld information which described the information contained in the documents as legal advice. The DWP explained in the letter that the papers related to legal advice on both policy issues and litigation advice and therefore fell within section 35. 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 factors were 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

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.

## Analysis

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### Procedural issues

10. The Commissioner has considered whether the public authority has complied with its procedural obligations under section 17 of the Act.

Section 17(1) states that a public authority which in relation to any request for information, 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. The time stipulated for complying with section 1(1) of the Act, set out at section 10(1) of the Act is promptly and in any event not later than the twentieth working day following the date of receipt. If a public authority does not raise an exemption until after the section 17(1) time period, it is in breach of the provisions of the Act in respect of giving proper notice as the notice was late.

The complainant made an initial request for the information on 21 November 2005 and the DWP confirmed that it received the request on 23 November 2005. On 29 December 2005 the DWP wrote to the complainant advising him that the request was too broad and would exceed the cost limit. The DWP suggested categories of information which might not exceed the cost limit and requested clarification from the complainant as to the categories sought. The complainant clarified his request on 9 January 2006 and the DWP wrote to the complainant on 24 January 2006 to advise that it was withholding the information in reliance on the exemptions at section 42 and section 35 of the Act.

In order to comply with section 17(1), the DWP ought to have sought clarification of the information requested as soon as possible, then stopped the clock for compliance with the 20 working days time limit until the request was clarified and finally issued the refusal notice. The DWP, however, failed to do so and by serving the refusal notice outside the 20 working day time limit breached section 17(1) of the Act.

### Exemptions cited

#### **Section 42 (legal professional privilege)**

11. The Commissioner has considered whether the DWP correctly applied the section 42 exemption.
12. 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?**

13. 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.”*

14. Legal professional privilege is classified into two categories; legal advice privilege and litigation privilege.

15. 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.”<sup>1</sup>

16. 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.

17. 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?**

18. The Commissioner has viewed the withheld information and can confirm that it consists of confidential communications between the DWP and its lawyers in

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<sup>1</sup> See Bankim Thanki QC, *The Law of Privilege*, (2006), p8

the Government Legal Service for the purpose of receiving legal advice and is therefore information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

### **The public interest**

19. 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**

20. 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)<sup>2</sup> 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.”*

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.”*<sup>3</sup>

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

<sup>2</sup> (1983) QB 878, 913

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

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.

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.

For completeness the Commissioner was presented with no evidence that there had been a waiver by the public authority in this instance.

### **Public interest factors favouring the release of the information**

21. 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, does not accept this, however, and 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 March 2003 the Child Support Agency, which is part of the DWP introduced a new system of grading of child maintenance as provided for in the Child Support, Pensions and Social Security Act 2000. Not all people paying child maintenance were transferred to the new system in March 2003. It was argued by some that the system was unfair as it was possible that the amount of child maintenance due to a child would be different depending on the grading system used. It was further argued that this amounted to discrimination which is prohibited under the ECHR.

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

22. 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**

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

## **Other matters**

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24. When the complainant made his complaint he asked the Commissioner to take account of the fact that he had not threatened legal proceedings against the Government. For the purposes of clarification the Commissioner wishes to confirm that legal advice is capable of being protected by privilege even though litigation is not contemplated or pending as explained at paragraph 15.

## **The Decision**

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25. The Commissioner's decision is that the DWP was entitled to refuse to provide the requested information on the basis that the information was exempt under section 42 of the Act.
27. However, the Commissioner has also decided that in handling the request the DWP failed to issue the refusal notice within 20 working days of the date that the request was received and therefore committed a breach of section 17(1) of the Act.

## **Steps required**

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29. 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

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30. 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](mailto:informationtribunal@dca.gsi.gov.uk)

**Dated the 30<sup>th</sup> day of August 2006**

**Signed .....**

**Marie Anderson  
Assistant Information Commissioner**

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

## Legal Annex: Relevant statutory obligations

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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.