

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 March 2010

Public Authority: Her Majesty's Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Summary

The complainant made a request to Her Majesty's Treasury for information concerning Treasury involvement in connection with the Legal Services Bill. In particular the complainant was looking for information relating to the exemption of government lawyers from paying practising fees. The Treasury refused to disclose the requested information citing the exemption at section 35 of the Act. The Commissioner found that the exemption at section 35 was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner therefore found that the Treasury had acted correctly in withholding the information.

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.

Background

Legal Services Reform

2. In 2001 the Office of Fair Trading (the OFT) published a report recommending that rules governing the legal professions should be subject to competition law and that unjustified restrictions on competition be removed. Following this, the Government carried out a

- consultation, and published a report into competition and regulation in the legal services market.
3. In 2004 an independent review of the regulation of legal services instigated by Government found that many areas were in need of restructuring and development, and concluded that the current regulatory model was 'inflexible, outdated and over-complex'.
 4. In October 2005 the Government published a White Paper, *The Future of Legal Services: Putting Consumers First*. The White Paper set an agenda for reforming the delivery of legal services. It proposed a new regulatory framework that would direct regulation to those areas where it was needed.
 5. Subsequently, the Legal Services Bill (the Bill) was introduced in the House of Lords on 23 November 2006. The Bill established a new framework for the regulation of legal services in England and Wales, the Legal Services Board, an independent Office for Legal Complaints (OLC) and Alternative Business Structures (ABS) to enable lawyers and non-lawyers to work together on an equal footing to deliver legal and other services.
 6. During the passage of the Bill through Parliament several amendments were tabled and considered. One such amendment, section 193, proposed the removal of the exemption that applies to government lawyers from the need to hold a practising certificate and thus payment of practising fees. This amendment was put forward in the belief that all those subject to regulation should contribute to regulation.
 7. The Ministry of Justice assumed responsibility for the Bill on 9 May 2007. After several amendments the Bill received Royal Assent on 30 October 2007. The Ministry of Justice is now responsible for managing the implementation of the Legal Services Act 2007 to ensure a smooth transition to the new regulatory regime.

The Request

8. On 9 March 2007 the complainant contacted the Treasury to request information in relation to Treasury involvement in connection with the Bill. Specifically he requested the following:

'I shall be grateful if you will provide me with the recorded information held by Treasury regarding any analysis (including statistical information) and/or objections to proposals to the introduction of

measures of, or considered in connection with, the Legal Services Bill on the basis of costs to the Treasury.....

Please can you first deal with matters concerning the exemption of government lawyers paying practising certificate fees?What I am seeking in connection with the exemption of government lawyers from paying practising certificate fees is the overall position of the Government (including that of Treasury) and full explanation for it.'

9. On 10 April 2007 the Treasury responded to the complainant advising that only one document was held that was pertinent to his request, and given that the Bill was currently in passage through Parliament it was considering the application of the exemption under section 35(1)(a) of the Act (formulation of government policy). As this exemption was subject to the public interest test the Treasury indicated that it needed to extend the time limit beyond 20 working days to consider the public interest in disclosure of the information. The Treasury indicated that it hoped to provide a substantive response by 27 April 2007.
10. The Treasury also advised the complainant that the Department of Constitutional Affairs (now the Ministry of Justice (MOJ)) was the lead policy department for the Bill and that as such it might hold information relevant to his request.
11. On 30 April 2007 the Treasury responded to the complainant and explained that it was refusing to disclose the requested information, citing section 35(1)(a) of the Act. However the Treasury also enclosed a link to the Government's response to the issue of costs and the exemption for government lawyers for the complainant's information.
12. In relying upon section 35(1)(a) the Treasury argued that sporadic disclosures of information whilst draft legislation was in the process of being scrutinised by Parliament would undermine the focus and balance of Parliamentary scrutiny. Furthermore, the Treasury asserted that the public interest favoured maintaining the exemption.
13. On 2 May 2007 the complainant requested an internal review of the Treasury's decision not to disclose the requested information.
14. The Treasury relayed the outcome of the internal review to the complainant on 5 March 2008. The internal review upheld the Treasury's original decision not to disclose the requested information.

The Investigation

Scope of the case

15. On 3 June 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

16. Regrettably, due to the heavy workload at the Commissioner's office, the investigation into the complaint did not get under way until October 2009. On 21 October 2009 the Commissioner contacted the Treasury and asked for its representations regarding the handling of the request.
17. In particular the Commissioner requested:
- a detailed description of the policy formulation/development exercise to which the requested information related
 - an explanation of why the matter was considered to be policy/what was being done should be considered as the formulation of policy
 - how the information requested related to that process and
 - when the process was completed ie was this at the time the Bill was given Royal Assent?
18. The Treasury was also asked to provide to the Commissioner a copy of the withheld information in order to assist in his considerations of whether the exemption cited had been applied correctly.
19. On 19 November 2009 the Treasury responded to the Commissioner on the issues raised and enclosed a copy of the withheld information. The Treasury confirmed that the only information held in relation to the specific clause of the Legal Services Bill referred to in the request (section 193) was a single document provided for the purpose of discussing various policy options to enable the passage of the Bill through Parliament. The Treasury reiterated that the MOJ, not itself, was the lead department in relation to the Bill.
20. The Treasury also stated that it had no view on the question of practising certificates as the clause merely preserved the status quo from the Solicitors Act 1974 and the putative costs of alternative options were below any threshold at which departments might seek additional funds from the Treasury.
21. The Treasury contended that since the request was received whilst the Bill was still under active debate in Parliament, the disclosure of

information contributing to the policy development or formulation process during the stages of the Bill would not be in the public interest.

Analysis

Exemptions

22. The Treasury refused to disclose the requested information under section 35(1)(a) of the Act, arguing that there could be no doubt that the requested information related to the formulation or development of government policy.

Section 35(1)(a): formulation or development of government policy

23. Section 35(1)(a) provides that information that relates to the formulation or development of government policy is exempt information. The task in determining whether this exemption is engaged is to consider whether the information in question can be accurately characterised as relating to the formulation or development of government policy.
24. The Commissioner's view is that the term 'relates to' as it is used in the wording of this exemption can safely be interpreted broadly. At paragraph 58 of *DfES vs the Commissioner & Evening Standard (EA/2006/0006; 19/02/07)*, the Information Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of that information, rather than on a line by line dissection.
25. In this case the Commissioner's decision is based on whether the overall purpose and nature of the information requested on 9 March 2007 supports the characterisation of relating to formulation or development of government policy, rather than on a detailed consideration of the document itself.
26. Information relating to the formulation of government policy can be separated into two broad categories; (i) exchanges within the public authority and (ii) discussions between the public authority and third parties. However, the Commissioner notes other information may also fall within this exemption such as notes on an issue or draft documents.
27. In this case the information fell within the latter category, that is, discussions between the public authority and third parties. The

information held by the Treasury detailed various policy options in relation to section 193 that had been provided to the Treasury by the MOJ policy team as part of interdepartmental discussions prior to finalising a submission to ministers.

28. The Treasury confirmed that the purpose of this submission to ministers was to enable the passage of the Legal Services Bill through Parliament. The policy underpinning section 193 was subject to considerable debate and lobbying of Opposition peers from pre-legislative scrutiny right through to the final stages of Parliamentary consideration. A recommendation that the exemption from the requirement to hold a practising certificate for government solicitors be removed from statute was made by the Joint Committee and amendments were also tabled by the Opposition at various stages in both the House of Commons and the House of Lords.
29. The Commissioner is of the view that government ministers leading legislation through Parliament need to be supported in policy development options, including briefing on the impact of and possible response to any amendments tabled by the Opposition.
30. The Commissioner therefore accepts that the process recorded in the requested information constitutes the formulation and development of government policy and, therefore, falls within the class of information specified in the exemption.
31. Section 35 is a qualified exemption and is therefore subject to a public interest test. This requires the Commissioner to determine whether the public interest is best served by maintaining the exemption or by releasing the information sought.
32. The Commissioner notes the comments of the Tribunal in *Scotland Office v the Information Commissioner (EA/2007/0128)* with respect to not regarding information falling under section 35 as being routinely exempt from disclosure, otherwise such information would have been protected in the Act under an absolute exemption rather than a qualified one.

Public interest arguments in favour of disclosing the requested information

33. The Treasury acknowledged that there is a strong public interest in understanding generally how Parliament works and the need for ministerial accountability.
34. The Treasury also recognised the general public interest in the transparency of policy formulation and specifically in relation to this

Bill, the strong interest of stakeholders in how the allocation of costs might extend to the issue of the exemption of government lawyers.

- 35 The Commissioner recognises there is also a public interest in facilitating public understanding of, debate on, and participation in policy making and the democratic process.

Public interest arguments in favour of maintaining the exemption

36. The Treasury's arguments given in favour of the maintenance of section 35(1)(a) concerned the need for ministers and officials to have 'space' during the policy development process. This argument is often referred to as the 'safe space' argument.

Safe Space

37. The Treasury highlighted the importance of Ministers being able to appraise policy options with regard to creating new legislation and to be fully supported by officials through free and frank policy advice during the passage of that legislation through Parliament. In order to achieve this, ministers and officials need 'space' to protect the policy making process whilst it is ongoing. Had the requested information been disclosed whilst the draft legislation was still under consideration, the Treasury contended that the fuelling of debate and potential increase in lobbying of the Opposition would have compromised parliamentary accountability and undermined the focus and balance of parliamentary scrutiny.
38. The Treasury also confirmed that it had consulted with the MOJ as the lead government department for the Bill and the producer of the requested information as to whether the exemption should be maintained. The MOJ's view was that the balance of public interest lay firmly with preserving the necessary space for ministers to be provided with policy options and assessments.
39. The Commissioner's view is that there is no inherent public interest in withholding information that is covered by a class based qualified exemption. Thus consideration of maintaining section 35(1)(a) must take into account the potential harm any disclosure would have on the process of policy formulation or development. Such harm is likely to decrease once the process has been completed but this does not mean that the public interest in maintaining the exemption disappears completely.
40. The Commissioner looks to the Tribunal comments in relation to the need for 'safe space' for guiding principles in this respect.

41. In the *DfES* case the Tribunal recognised the importance of ministers and officials being entitled to time and space to hammer out and explore options whilst formulating policy without the threat of 'lurid headlines' (para 75).
42. The Commissioner also recognises the importance of the need for safe space to debate policy and reach decisions without being hindered by external comment. Furthermore he considers that an important determining factor in relation to the 'safe space' argument will be whether the request for information is received whilst a safe space is still needed in relation to that particular policy making process. In this case the requested information was at a later stage of policy formulation as the Bill had already been introduced and so the need for a safe space had waned.

Balance of the public interest arguments

43. The Commissioner recognises the public interest in ensuring frank debate and advice in the interests of well-considered policy making and robust legislation.
To this end ministers are publicly accountable through their remarks in Parliament, which together with supporting documentation can be accessed via the MOJ website.
44. However, the Commissioner is also cognisant that the disclosure of information that relates to on-going policy development in advance of such policy being formalised and publicised is not in the public interest.
45. The Treasury had argued that parliamentary accountability would have been compromised by disclosure of the requested information. Whilst the Commissioner is cognisant that the exemption at s35(1)(a) is there to protect the ability of government to make strong policy, not to protect the role parliament plays in passing that policy into law, he is of the view that this remains a relevant consideration.
46. The Commissioner accepts the Treasury's view that there is a strong public interest in deferring to parliamentary proceedings as the primary forum for consideration of issues pertaining to draft legislation. In this instance the Legal Services Bill was debated from July 2006 to June 2007 and in addition to the public record of proceedings maintained by Hansard, various reports on each stage of its passage were published. Had the requested information been disclosed during this process, Parliament would have experienced an increase in lobbying activity that would have detracted from the main policy issues under consideration.
47. The Commissioner recognises that there is a public interest in officials being able to discuss 'live' policy issues without external scrutiny and is

therefore persuaded that disclosure of the requested information, at the time of the request, would have damaged the formulation/development of policy and would not have been in the public interest.

48. The Commissioner is also aware that public interest arguments in relation to the requirement for safe space as regards policy formulation diminish over time as policy becomes more certain and a decision as to policy is made public. This is in keeping with the Tribunal's comments in *DBERR v the Information Commissioner and Friends of the Earth*.¹
49. Although the Bill received Royal Assent in October 2007, there is always the potential for the issue regarding the exemption of government lawyers to surface and become live again. In view of this the Commissioner is satisfied that the requirement for safe space had not waned significantly and he considers that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

The Decision

50. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

51. The Commissioner requires no steps to be taken.

Other Matters

Delay in conducting internal review

52. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that internal reviews should be completed as promptly as possible.

¹ EA/2007/0072

53. In the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed.
54. In this case the complainant's internal review request was made on 2 May 2007 and the Treasury issued its decision on 5 March 2008. The Treasury therefore took almost a year to complete the review.
55. The Commissioner notes that the Treasury's internal review in this case was conducted after the issuing of the *'Good Practice Guidance No 5'* in February 2007. Furthermore he does not believe that the exceptional circumstances cited by the Treasury, ie the passage of the Bill through Parliament, the lack of experts to assess the information and the need to change the reviewer midway, justify that delay. The Commissioner therefore wishes to register his view that the Treasury fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

Right of Appeal

56. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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 22nd day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 35

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to –

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.”