

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 2 February 2010

**Public Authority:** Department for Work and Pensions  
**Address:** 2nd Floor, The Adelphi  
1-11 John Adam Street  
London  
WC2N 6HT

### Summary

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The complainant requested copies of “*Any document or legal opinion of the dept of the DWP referred to in Para 21 of the explanatory notes [provided to Parliament in support of the Health and Safety (Offences) Bill]*”. The requested information was refused by the Department for Work and Pensions (DWP) on the grounds of the exemption provided by section 42(1) of the Act, relating to legal professional privilege. The Commissioner’s decision is that the refused information attracts legal professional privilege and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

### The Commissioner’s Role

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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

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2. Section 40 of the Health and Safety at Work Act 1978 (HSWA) reverses the normal burden of proof in the case of an alleged breach of that Act. Article 6 of the European Convention of Human Rights (ECHR) enshrines the right to a fair trial and the presumption of innocence. The legality of section 40 of the HSWA was tested in the Court of Appeal, which ruled that this did not breach Article 6 of the ECHR. A part of the ruling was that the HSWA was regulatory in nature and not truly a criminal offence, and does not usually engage a custodial penalty. In 2008 a Bill to amend the HSWA was introduced, and is now enacted as the

Health and Safety (Offences) Act 2008. It received Royal Assent on 16 October 2008 and came into force 3 months later. This provides for custodial penalties of up to 2 years for most offences under the HSWA.

3. The complainant has expressed his concern that the introduction of substantial custodial penalties for breaches of the HSWA may therefore now be contrary to Article 6 of the ECHR. He sought information from the DWP which would clarify the basis on which it had concluded that this would not so breach the ECHR, as evidenced in the explanatory notes to the Bill, provided to Parliament.

## The Request

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4. The request was submitted on 20 April 2008 to the Health and Safety Executive (HSE). The HSE passed it to the DWP as it was the Department responsible for the Health and Safety (Offences) Bill. The request was made with regard to the explanatory notes provided to Parliament for its consideration of the Health and Safety (Offences) Bill. The request was in three parts, the last part is the subject of this complaint investigation. The complainant requested:

*“Any document or legal opinion of the dept of the DWP referred to in Para 21 of the explanatory notes”.*

5. On 16 June 2008, the DWP replied, providing responses to elements of the request, but refusing the part, above, on the grounds that the requested information was subject to legal professional privilege and therefore exempt from disclosure under section 42(1) of the Act.
6. The complainant requested an internal review of the response on 24 June 2008. On 23 October the DWP responds with the outcome of its internal review, in which it upheld the previous decision.

## The Investigation

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### Scope of the case

7. On 24 February 2009 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 the following points:
8. The complainant accepts that the withheld information would attract legal professional privilege, but argued that in the circumstances of the case, the public interest in disclosure outweighs the public interest in maintaining the exemption.
9. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## Chronology

10. On 2 June 2009 the Commissioner wrote to the DWP to request a copy of the withheld information and detailed arguments for its position in respect of that information, specifically:
  - a) Did the public authority consider that legal professional privilege applied to all the information withheld? In the event that some information was not considered to attract legal professional privilege, would the DWP consider disclosure of that information?
  - b) For each document considered by the DWP to attract legal professional privilege, the public authority was requested to demonstrate that the document satisfied the criteria of being a confidential communication between the DWP and its professional legal adviser, acting in his professional capacity, for the sole or dominant purpose of obtaining legal advice.
11. The public authority was also asked to clarify the steps taken to locate information which might be caught by the request.
12. The DWP replied on 17 June 2009, providing a detailed response to the Commissioner's enquiries.

## Analysis

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### Exemptions

#### Section 42 – legal professional privilege

13. In his request for internal review in his letter to the DWP of 24 June 2008, the complainant acknowledged that such legal advice would attract legal professional privilege (LPP) and fall within the scope of section 42(1). This was also subsequently acknowledged in his complaint to the Information Commissioner's Office.
14. The Commissioner has obtained a copy of the withheld legal advice and is satisfied that it fulfils the criteria of being a confidential communication between the DWP and legal adviser(s) acting in a professional capacity, and made for the dominant purpose of obtaining legal advice. The Commissioner therefore agrees that the legal advice engages section 42(1) of the Act.
15. Section 42 of the Act is a qualified exemption and is therefore subject to a public interest test. The complainant has outlined a series of reasons why he considers the public interest in maintaining the exemption does not outweigh the public interest in disclosure, and therefore his belief that the advice should be disclosed.

## Public interest arguments in favour of disclosing the requested information

16. Where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure, the information may be withheld. In all other circumstances, the information should be disclosed.
17. There are accepted, general, public interest arguments in favour of disclosure such as the assumption in favour of disclosure under the Act and the public interest in the transparency and accountability of government decisions.
18. Other factors which are commonly advanced in favour of disclosure include circumstances where significant sums of (public) money are involved or where a large number of people are affected by actions to which the advice applies. This has been upheld by the Information Tribunal in the case of Mersey Tunnel Users Association (EA/2007/0052), concluding at paragraph 51:

*"[...] that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining the exemption, which is all the stronger in this case because the opinion is still live. To quote Bellamy : "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that public interest". In our judgement, the countervailing considerations adduced here are not equally strong; they are stronger. The opinion should be disclosed."*

19. The complainant has also outlined additional public interest factors in support of disclosure of the information in his complaint to the ICO, and these are considered relevant to the case:

- a) The reverse burden of proof is a controversial measure with wide ranging constitutional implications.
- b) The 'opinion' has been relied upon in a public Explanatory Note and disclosure of the legal advice supporting that opinion would serve to illustrate that the DWP's view and a subsequent government decision were based upon a sound analysis of the issue. The Commissioner has therefore accorded weight to understanding the basis of the government's legal position on the Bill at the time it was progressing through Parliament. Given the potential impact on individuals of the change to the legislation the Commissioner has accorded this argument significant weight.

20. A differently-constituted Tribunal in the case of the *Foreign and Commonwealth Office (FCO)* (EA/2007/0092) stated, at paragraph 29:

*"What sort of public interest is likely to undermine the maintenance of this privilege? There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there*

*are clear indications that it has ignored unequivocal advice which it obtained.”*

21. The complainant's argument amounts to a wish to examine and, possibly, criticise or challenge the advice given. It has not been suggested that the DWP is misrepresenting or ignoring the advice it has received. Even accepting the benefits of public scrutiny of such decisions, the Commissioner is not persuaded that the complainant's arguments at paragraph 20 would amount to the sort of strong public-interest arguments intended by the Tribunal in *Foreign and Commonwealth Office*, above, which also commented, at paragraph 30:

*“The interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go. Disclosure of privileged opinions is not a substitute for legal aid.”*

#### **Public interest arguments in favour of maintaining the exemption**

22. There is a strong element of public interest inbuilt into the LPP exemption and the concept of safeguarding the right of any person to obtain free and frank legal advice, which in turn serves the wider administration of justice. While it is important to stress that section 42 is not an absolute exemption, this inbuilt public interest commands significant weight in the public interest test. The countervailing arguments must be considered to be at least equally as significant in order to determine that the information should be disclosed.
23. Attributing significant inbuilt public interest in protecting LPP is an established approach supported by numerous decisions made by the Information Tribunal, including *Bellamy* (EA/2005/0023) which stated, at paragraph 35:

*“As can be seen from the citation of the legal authorities regarding legal professional privilege, there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that in certain cases, of which this might have been one were the matter not still live, for example where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight. The Tribunal places no great, if any, store upon the fact that the constituency of which Mr Bellamy forms part may be small, since it may well be that in any given case there is a sufficient public interest even though the actual number of individuals are affected by an issue, may be numerically low. 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”.*

24. Additionally, earlier this year a High Court decision in the case of *DBERR v O'Brien & ICO* [2009] EWHC 164 (QB) commented that the general approach of the Tribunal was correct in attributing significant weight to the public interest inbuilt into the exemption.
25. Additional factors such as the currency and context of the legal advice are also considered to affect the public interest considerations in this case. The legal advice requested by the complainant is considered 'current' in the sense that it relates to a Bill which was still progressing through Parliament and did not become law until January 2009 and was clearly therefore still 'live' advice relied upon by the public authority at the time of the request.
26. Furthermore, the nature of legal advice is that it often presents the arguments both in favour of and against a particular view. This serves the public interest in ensuring government decisions are taken in view of full and informed legal advice which can improve the quality of decision making. There is a strong public interest in the government obtaining free and frank legal advice in order to inform the decisions it takes, and therefore in LPP being maintained.

### **Balance of the public interest arguments**

27. When the public interest considerations are balanced, the Commissioner has considered the general arguments commonly set out, together with the specific arguments advanced by the complainant.
28. Commissioner finds that the arguments related to the public interest inherent in the protection of LPP and the particular "live" nature of the advice in this case are strong enough to outweigh the public interest arguments in favour of disclosure.

### **The Decision**

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29. The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act.
30. The Commissioner considers the DWP to have correctly applied the section 42(1) exemption and does not require it to take any further action regarding the complainant's request for information.

### **Steps Required**

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31. The Commissioner requires no steps to be taken.

## Other matters

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32. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
  
33. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that 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 in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 80 working days for an internal review to be completed, despite the publication of his guidance on the matter.



## Right of Appeal

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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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 2<sup>nd</sup> day of February 2010**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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



## Legal Annex

### **S.10 Time for Compliance**

**Section 10(1)** provides that –

*'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.'*

**Section 10(6)** provides that –

*'In this section –*

*"the date of receipt" means –*

*(a) the day on which the public authority receives the request for information, or*

*(b) if later, the day on which it receives the information referred to in section 1(3);*

*"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.'*

### **S.42 Legal Professional Privilege**

**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.'*

**Section 42(2)** provides that –

*'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.'*