

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 23 August 2010**

**Public Authority:** Merseyside Passenger Transport Executive  
**Address:** Merseytravel  
24 Hatton Garden  
Liverpool  
L3 2AN

### Summary

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The complainant requested information concerning the legal advice taken to direct overpayments at tolls to charitable organisations. The public authority explained the general nature of its advice but refused to disclose its actual advice by virtue of section 42(1) of the Act. It maintained its view at internal review. The Commissioner has considered the case in detail and has determined that the public authority had applied section 42(1) correctly in this case. He did however find a breach of section 10(1) because the public authority failed to provide a response to the request within 20 working days. It also breached section 17(1) by failing to issue a refusal notice within 20 working days of the request. He requires no remedial steps to be taken.

### 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. The Commissioner notes that under the Act Merseytravel is not a public authority itself but is an integrated Transport Authority that is managed by Merseyside Passenger Transport Executive. The public authority in this case is therefore Merseyside Passenger Transport

Executive, which is covered by paragraph 28 of Schedule 1 of the Act. However, for the sake of clarity, this decision notice refers to Merseytravel as if it were the public authority.

3. This request concerns the decision of the public authority to pay to charity the excess revenue generated by the Mersey Tunnels from users who pay more than the toll payable ('toll overpayments'). 'Toll overpayments' can arise because the barrier in an unstaffed lane at the toll plaza does not give change. Hence a driver who selects an unstaffed lane could put £1.50 in the barrier for a £1:40 toll and there would be a 10p overpayment that will be given to charity.
4. The public authority has explained that it has power, as an Integrated Transport Authority, to pass toll overpayments to charity in exercise of its general powers (including now, well-being powers), and has confirmed that it has received legal advice from its solicitors on this issue. The request concerns whether this legal advice can be provided.

## The Request

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5. On 30 July 2009 the complainant made a number of requests for information to the public authority and this included the request that was referred to the Commissioner:

*"In that case will Merseytravel release whatever information that they have on how they determined that it was legal to use "Toll Overpayments" in the way that they apparently have."*

6. On 30 July 2009 the public authority wrote to the complainant. It asked for the complainant to clarify what was being requested in line with section 1(3) of the Act. It did not ask for clarification about the request mentioned above.
7. On 8 September 2009 the public authority responded to the clarified requests for information. In respect of the request that was referred to the Commissioner it stated what follows on the next page:

*'Our [previous] reply was to the effect that the ITA has power to pass toll overpayments to charity in exercise of its general powers (including, now, well-being powers) as an ITA.'*

*We have received some legal advice on this issue but are not prepared to release it to you because as this information is contained in advice from our solicitors it is information in respect of which a claim to legal professional privilege could be*

*maintained in legal proceedings, and therefore it is exempt from disclosure under s.42 of the FOI Act. Section 42 is a qualified exemption, however, and so it is necessary for Merseytravel to consider the public interest in releasing the information and to weigh it against the public interest in maintaining the exemption. We have done so and in the circumstances of this case do not consider that the public interest in disclosure is as great as the public interest in maintaining the exemption.*

*This is for the following reasons. Disclosure of the legal advice would only increase transparency in a limited way: it would not increase transparency about what the decision was, the sums involved or the policy reasons for that decision, all of which are known (including Merseytravel's corporate policy in relation to charitable donations), but only about the legal decisions taken into account by Merseytravel in determining whether it had the vires to make those payments. Such transparency would relatively easily have been obtained by you taking your own legal advice about the authority for Merseytravel's actions. In our view, this is clearly outweighed by the public interest in enabling Merseytravel to take proper legal advice.'*

8. On 10 September 2009 the complainant requested an internal review from the public authority. He explained that he did not believe that the general powers could provide authority to allow the public authority to spend the overpayments in this way.
9. On 24 September 2009 the complainant provided submissions containing his view about the way the public interest test should be decided. He stated:

*'Our general view is that public authorities should be open in what they do. In this particular case Merseytravel have taken monies from users of the Tunnels and used it in a way that does not seem to be in accordance with the Mersey Tunnels legislation.*

*Your message on the 8th said that "Disclosure of the legal advice would only increase transparency in a limited way: it would not increase transparency about what the decision was, the sums involved or the policy reasons for that decision, all of which are known (including Merseytravel's corporate policy in relation to charitable donations), but only about the legal decisions taken into account by Merseytravel in determining whether it had the vires to make those payments. Such transparency would relatively easily have been obtained by you taking your own legal advice about the authority for Merseytravel's actions. In our*

*view, this is clearly outweighed by the public interest in enabling Merseytravel to take proper legal advice."*

*We do not agree that "only" increasing transparency about the legal decision is not important. Neither would we accept the view that Merseytravel would not be able to take "proper legal advice" if it might later have to publish it. If an authority are not sure about whether they can do something and then obtain legal advice that they can, I think it is entirely reasonable that they publish the advice, so as to remove anyone else's doubts. In this particular case you say that you have received legal advice on the issue and it is implied that the advice is that Merseytravel have acted legally. In my view it is in the public interest that Merseytravel reveal the full advice to demonstrate to the public that Merseytravel have acted in a proper way.'*

10. On 9 October 2009 the public authority communicated the result of its internal review. It explained that it had considered the matter afresh, but maintained its position. It stated that the advice it received was confidential and that it is information in respect to which a claim to legal professional privilege could be maintained in legal proceedings. It said that it had conducted a new public interest determination while taking into account the arguments it received on the 24 September 2009. It explained that it continued to believe that the public interest favoured maintaining the application of the exemption in this instance. It provided the following reasons:
  1. While it recognised that there is a public interest in transparency about the legality of the decision, in its view, the disclosure of this legal advice would only increase transparency in a limited way. This is because it would not increase transparency about what the decision was, the sums involved or the policy reasons for that decision, all of which are known (including its corporate policy into charitable donations) and would only concern the legal considerations taken into account by the public authority determining whether it had vires (legal authority) to make those payments. It explained that the same legal considerations could be obtained by him taking independent legal advice about the authority of its actions;
  2. The disclosure of the advice would not confirm that the public authority's action was legal, only that it was advised that it was. It is not possible to make a definitive statement without the court deciding. It explained that it believed that the transparency being sought in this case has been served by the

knowledge that the legal advice has been taken and that the advice was that the payments were legal; and

3. It explained that it understood that the Information Tribunal has recognised on a number of occasions that there is a public interest in ensuring public authorities are able to take informed legal advice in confidence which carries substantial weight. It explained that it felt that the impact of disclosure of the information may prevent robust and frank advice being given and discourage the seeking of advice in the future. These effects would lead to the undermining of the public interest in maintaining legal professional privilege and the arguments for disclosure of this information would not outweigh the strong public interest in maintaining that privilege.

Finally, it explained that the complainant could appeal this decision to the Information Commissioner and provided his details.

## The Investigation

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### Scope of the case

11. On 20 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained:

- *'We are now complaining to the ICO and ask that the ICO decide that "whatever information that they have on how they determined that it was legal to use "Toll Overpayments" in the way that they apparently have" should be released by Merseytravel.'*
- *'The reason for the legal authority question was because the use to which tolls can be put is controlled by legislation. There was a change in the law in 2004 which widened what Tunnels monies could be used for, but the extended powers did not include giving money to charities. '*
- *'Merseytravel have affected their right to do so by referring to the legal advice when trying to justify their action.'*
- *'I understand that in any case the exception [sic \*exemption] on the release of legal advice is subject to a "public interest test". In our view it is definitely in the public interest that a*

*public organisation is fully open about the authority for their action, when they start giving Tunnels monies to charities and get publicity for doing so. I would point out that the Birkenhead Tunnel opened in 1933 and this largesse only started in 2008, as far as we know. '*

12. The Commissioner believes that the only request that has been referred to him is the one outlined in the request section above and he has determined this case on that basis.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, the Commissioner has no jurisdiction to decide whether or not the relevant legislation provides authority for the public authority to donate 'toll overpayments' to charity. The Commissioner can only focus on the information access issues which concern whether or not the legal advice can be disclosed.

### **Chronology**

14. On 4 December 2009 the Commissioner wrote to the public authority. He asked for the public authority to provide him with the withheld information and its arguments about why it was relying on section 42(1) on the circumstances of this case.
15. On 6 January 2010 the Commissioner received both the withheld information and detailed submissions from the public authority.
16. On 28 January 2010 the Commissioner wrote to the complainant. He asked to receive an unedited version of his email to the public authority dated 30 July 2009 and any other emails that the complainant thought were relevant. He also summarised the public interest arguments that he had received from the complainant so far and invited the complainant to make any further arguments that he wished for the Commissioner to consider.
17. On 1 February 2010 the complainant provided an unedited copy of the email dated 30 July 2009.
18. On 5 February 2010 the complainant provided a more detailed response. He explained that he wished for the Commissioner to also consider two further exchanges of emails. He explained that he did not think that the privilege claim would attach to anything other than the advice itself, and where it was engaged he did not think that the Commissioner had considered the public interest test correctly in previous decisions.



19. On 8 February 2010 the Commissioner communicated his detailed preliminary opinion in this case and asked the complainant whether he wished to pursue the matter further.
20. On 9 February 2010 the complainant responded to the Commissioner's letter. He stated that he did not agree with the Commissioner's view. He explained that he agreed that the verdict may follow the Commissioner's and Tribunal's previous decisions but that in his view they were wrong. He said that the exemption was qualified and therefore the weight placed on the privilege concept by the Commissioner did not accord with the legislation. He also explained that the Commissioner may have erred in his view that the privilege had not been waived in this instance. The Commissioner acknowledged this email on the same day and explained that a Decision Notice would therefore be issued.
21. On 9 February 2010 the complainant responded and asked for the Commissioner to explain why he may be relying on House of Lords cases when they were not directly upon the Act. On 10 February 2010 the Commissioner replied to this enquiry.
22. On 10 February 2010 the Commissioner spoke to the public authority on the telephone about whether there was the possibility of further recorded information that was embraced by the request. He confirmed what was being asked by email.
23. On 25 February 2010 the Commissioner received a response. He acknowledged it on the same day.

## **Analysis**

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### **Substantive Procedural Matters**

*What recorded information is held that is relevant to the request being considered by the Commissioner?*

24. The complainant has explained that he felt that his request outlined above may apply to more information than just the legal advice sought.
25. The Commissioner is limited to considering whether or not recorded information exists at the time of the request for information. This is the only information that a public authority is obliged to provide. This is made clear in section 1(4) of the Act. The time of the request of the information is 30 July 2009 in this case.

26. When investigating cases involving a disagreement as to whether or not further information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072)<sup>1</sup>. In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.
27. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the same case. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, the scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
28. The Commissioner will apply this standard of proof to this case.
29. The Commissioner has made an objective analysis of the request for information:  
  
*'Whatever information that they have on how they determined that it was legal to use "Toll Overpayments" in the way that they apparently have.'*
30. The request asks for information about 'how they determined it was legal to use the 'Toll Overpayments' in the way that they apparently have'. The withheld information addresses this exact issue.
31. The Commissioner believes that the words 'determined that it was legal' are crucial in this case. This means that the request is connected to a single event which was the very purpose of the legal advice. He notes that the public authority does not have jurisdiction to determine that what it does is legal instead it is necessary for it to obtain legal advice as in these circumstances, to see if its lawyers believe it would be legal. He is also satisfied that there is no need to revisit this issue once legal advice is obtained.
32. The public authority has explained that it made the request for legal advice by telephone and has no recorded information in relation to its

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<sup>1</sup> This decision can be located at:  
[http://www.informationtribunal.gov.uk/Documents/decisions/EA20060072\\_lindabromleyVinfor\\_31Aug07.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/EA20060072_lindabromleyVinfor_31Aug07.pdf)



request for legal advice. The Commissioner is content that this explanation is reasonable on the facts of this case. He notes that the request for legal advice, had it been held, would be afforded the same protection as the legal advice itself.

33. The public authority has also explained that it did acknowledge receiving the advice and that it believed that this email was also covered by section 42(1) to maintain the integrity of the information.
34. The Commissioner is satisfied on the balance of probabilities that there are only three relevant items of recorded information held by the public authority at the date of the request. These are:
  1. Two responses from external solicitors providing legal advice.
  2. An email acknowledgement by the public authority to the external solicitors acknowledging the receipt of the advice which also contains the advice provided.
35. He will consider the application of section 42(1) to these three items below.

## **Exemption**

### *Section 42(1)*

36. Section 42(1) of the Act is worded as follows:

*"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information"*

37. The application of section 42(1) of the Act was considered by the Information Tribunal in the decision of *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry [EA/2005/0023]*<sup>2</sup> where legal professional privilege was described as: -

*"a set of rules or principles which are designed to protect the 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."* (Paragraph 9)

38. The principle of legal professional privilege was considered in detail by the House of Lords in *Three Rivers District Council and others*

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<sup>2</sup> This decision can be located at:

[http://www.informationtribunal.gov.uk/Documents/decisions/bellamy\\_v\\_information\\_commissioner1.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/bellamy_v_information_commissioner1.pdf)

*(Respondents) v. Governor and Company of the Bank of England (Appellants) [2004] UKHL 48* ('the Three Rivers case'), where Lord Rodger explained the policy reasons for the principle in respect to legal advice:

*'If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available. As Lord Reid succinctly remarked in *Duke of Argyll v Duchess of Argyll* 1962 SC (HL) 88, 93, "the effect, and indeed the purpose, of the law of confidentiality is to prevent the court from ascertaining the truth so far as regards those matters which the law holds to be confidential." '(at Paragraph 54)*

*Is the exemption engaged?*

39. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
40. The category of privilege which the public authority is relying on to withhold this information is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. It was considered in detail in the Three Rivers case above and it explained that there were three requirements for material to engage legal professional advice privilege. They are:
  1. It must be between a qualified lawyer in their professional capacity and a client.
  2. It must be created with the sole or dominant purpose of obtaining or providing legal advice.
  3. It must be confidential.

41. Having considered the three pieces of withheld information the Commissioner notes that these were between a member of staff within the public authority and its qualified legal advisers. The Commissioner also notes that the information was communicated in the legal advisors professional capacity and was formal advice. The Commissioner has therefore concluded that the first requirement is satisfied.
42. In relation to the second requirement the determination of the dominant purpose can usually be found by inspecting the documents themselves. The Commissioner has examined the withheld information and is satisfied that the sole purpose of the correspondence was to obtain legal advice. This requirement is therefore also satisfied.
43. The third requirement is determining whether the information was confidential. The claimant has argued that the disclosure of what the information is about and further information that has been supplied to him indicates that the advice may have lost any confidentiality it once had. The Commissioner notes that the public authority has both referred to having the advice when justifying its action and explained to the complainant that its contents concern its *vires* [legal authority] to act in this way. Having viewed the information the Commissioner considers that it does have the necessary quality of confidence. He is satisfied that the information is neither trivial nor in the public domain. The Commissioner is also satisfied that the information was imparted in circumstances importing an obligation of confidence as he considers the requesting and receiving of legal advice can be regarded as a strong example of such circumstances. The Commissioner therefore considers that the information can correctly be seen as confidential.
44. As the three requirements are satisfied for all of the withheld information, the Commissioner has determined that the public authority correctly engaged section 42(1) in the circumstances of this case.

*Has the privilege been waived in the circumstances of this case?*

45. The complainant has argued that the public authority has inadvertently waived its right to rely on legal professional privilege in this case, through disclosing that it had obtained advice, what it had obtained advice about and its position after receiving that advice.
46. The public authority strongly argues that it has not done so. It has stated that it believes that privilege remains and this is why it is relying on that exemption under the Act. It has stated that it has not waived its right to privilege either intentionally or inadvertently.

47. The Commissioner's view is that public authority has not waived its privilege in this case. He notes, without revealing the withheld information, that there is no complete version within the public domain. He believes that the public authority has been helpful to the complainant but has clearly stated that it has relied on privilege consistently throughout its handling of this request.
48. The Commissioner notes that this is a situation of advice privilege. He believes that in circumstances other than litigation partial disclosure will not result in waiver of legal advice privilege. His view has been confirmed by the Information Tribunal in *FCO v Information Commissioner (EA/2007/0092)*<sup>3</sup> which stated:

*'There is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent will see what he is doing and demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate. Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned. Quite different is the position where the parties come to court; if evidence is adduced, it is there to be fully tested or scrutinised in relation to any relevant issue, whether it be witness, document or object.'* [at paragraph 22]

49. The Commissioner is satisfied that the information that has been provided to the complainant is not false. He is also satisfied that on the facts of this case that there is no waiver, that the confidentiality of the advice remains and therefore he must go on to consider the public interest test.

### **Public interest test**

50. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner is only able to consider factors that arise from the nature of the exemption when considering the maintenance of the exemption but can consider all public interest factors when considering the arguments in favour of disclosure.

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<sup>3</sup> This decision can be found at the following link:  
[http://www.informationtribunal.gov.uk/Documents/decisions/FCO\\_vICDecision\\_amendedWebsite\\_290408.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf)

51. It is important to note from the outset that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. It is also important to note that just because a large section of the public may be interested in the information, does not necessarily mean that the release of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public<sup>4</sup>.

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

52. In arguing that the public interest favoured withholding this information, the public authority has highlighted the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals. Furthermore, the public authority highlighted the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of section 42(1).
53. It explained that public authorities need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments and as a consequence legal advice may well set out the perceived weaknesses of the public authority's position. Without such comprehensive advice, the public authority's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.
54. Disclosure of legal advice has a significant prejudice to the public authority's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.

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<sup>4</sup> *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

55. The public authority argued that there is also a risk that lawyers and clients will avoid making a permanent record of the advice that is given or make only a partial record. This too would not be in the public interest. If this scenario was taken to its logical extreme, it is possible that there may even be a reluctance to seek legal advice. The Commissioner is not however persuaded by the argument that disclosure of this information would result in lawyers not maintaining proper records
56. The public authority has argued that already there has been an adverse Information Tribunal decision ordering some of its legal advice to be disclosed<sup>5</sup> and thereby the potential damage on public administration was particularly pertinent in this case. It said that it understood that there were special circumstances in the previous case (for example that the information would inform public debate, was nine years old, was wanted by a large number of individuals and would provide further accountability about a controversial project) but believed that there were no similar countervailing factors in the circumstances of this case.
57. It explained that the potential lack of legal advice could lead to decisions being taken that are legally unsound. Not only would this undermine the public authority's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided.
58. In addition it may be the case that wider considerations about the consequences in other situations will need to be considered. It is proper that the public authority is able to consider the wider picture and potentially rely on its advice in the future. This is a further public interest in maintaining the exemption.
59. The public authority concluded that although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professionally privileged material, it is likely to only be in 'exceptional circumstances' that this will be outweighed by the public interest in disclosure. It explained that the advice remains live as it is still being relied on and this also must strengthen the substantial public interest in maintaining confidentiality on the circumstances of this case. It noted that this fact also should mean that this case is distinguished from the previous case that was considered by the Tribunal.<sup>6</sup>

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<sup>5</sup> *Mersey Tunnel Users Association v Information Commissioner and Mersey Travel* (EA/2007/0052). <sup>5</sup> This decision can be located at: [http://www.informationtribunal.gov.uk/Documents/decisions/MerseyTunnelDecision\\_website.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/MerseyTunnelDecision_website.pdf)

<sup>6</sup> Ibid.



60. The Commissioner acknowledges the strength of the arguments advanced by the public authority. Indeed, as the public authority noted in its submissions to the Commissioner, there is a significant body of case law to support the view that there is a strong public interest factor that favours the withholding of information built into section 42(1). The Information Tribunal in *Bellamy* noted that:

*'there is a strong 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 ...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.'* (at paragraph 35)

61. The Commissioner also feels that it is necessary to address some points that arose in *Mersey Tunnel Users Association v Information Commissioner and Mersey Travel* (EA/2007/0052) which may be pertinent to this decision. The Tribunal in that decision explained that the inbuilt weight of the legal professional privilege factor in a section 42(1) determination may depend on whether the legal advice concerns personal interests of individuals rather than general administration issues. In this case the Commissioner believes that while the case concerns an administrative issue, it is equally important that public officials are able to seek confidential legal advice. He also notes that the sum of public money being spent is considerably less than in the previous case and this means that the principle should continue to have real weight.

62. The Commissioner also has some reservations about the full force of some of the points advanced by the public authority: The Commissioner agrees with the Tribunal's findings in the *Mersey Travel* decision that stated:

*'Nor can we see that any professional lawyer would temper their advice for fear of later publication: that would again be self defeating, to both client and lawyer, to say nothing of the lawyer's professional obligations'. (Paragraph 42)*

63. Overall, the Commissioner believes for the reasons in paragraphs 52 – 54 and 56 - 61 above that there should be considerable weight given to the inbuilt public interest factor in respecting the concept of legal professional privilege on the facts of this case.
64. Finally, the complainant has also argued that the content of the opinion has been largely disclosed so that the interest in maintaining legal

professional privilege is substantially weakened. The Commissioner supports this contention to a limited degree. The Commissioner believes that where all the information has been disclosed then the information will not engage the exemption. This is not the situation in this case. The Commissioner notes that it is the protection to the concept of legal professional privilege which is important and he must give appropriate weight to this factor when considering where the balance of the public interest lies.

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

65. However, it is important to remember that these factors are balanced against the arguments in favour of disclosing the legal advice which forms part of the requested information; Parliament did not intend the exemption contained at section 42(1) of the Act to be used absolutely. Indeed the Tribunal's decision in the case *Mersey Tunnel Users Association v Information Commissioner and Mersey Travel (EA/2007/0052)* underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by the public authority, in particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore the advice related to the issues which affected a substantial number of people.
66. In the Commissioner's opinion there is a strong public interest in people understanding the reasons for decisions made by public authorities. The public authority has also explained that it appreciates that there is public interest in it being accountable for the quality of its decision making. The Commissioner recognises that there is an assumption built into the Act that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities.
67. Furthermore, disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good quality legal advice and thus increase public confidence in the public authority's position.
68. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids the understanding of, and participation in, the public debate of issues of the day. However, the Commissioner believes that the disclosure of the withheld information would have a very modest effect in this regard in the circumstances of this case.

69. The public authority has also argued that the weight of the above factors are mitigated by the fact that anyone (including the complainant) would be able to instruct a solicitor and obtain independent legal advice on the lawfulness of using the excess money to pay charitable donations. Indeed, if the public authority was to be challenged in court then independent legal advice would be essential. It explained that the advice it has is only advice that it is relying upon and cannot be said to be definitive unless tested in court.

70. The Commissioner notes that this view has been supported by the Information Tribunal. It was originally observed by the Information Tribunal in *FCO v Information Commissioner* (EA/2007/0092) that:

*"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." (at paragraph 30).*

71. This paragraph was then developed by a differently constituted Tribunal in its recent decision in *Dr Thornton v Information Commissioner* (EA/2009/0071)<sup>7</sup> which quoted this paragraph and stated that:

*'Curiosity as to the legal advice a public authority has received, or the fact that its disclosure may enable the public to better understand the legal arguments relevant to the issue concerned, are, in that Tribunal's words, "weak" factors that do not outweigh the strong public interest in withholding information to which LPP applies. In the circumstances of this case we agree with this observation.'* (at paragraph 44).

72. The Commissioner accepts that in the circumstances of this case the weight of transparency is mitigated by the possibility of the complainant obtaining independent legal advice about his concerns about this issue.

73. The public authority has argued that the public interest in transparency and accountability has been satisfied by the knowledge that the advice has been taken, and that it advised that the actions were legal. The

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<sup>7</sup> This decision can be located at:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i375/Thornton\\_v\\_IC\\_&\\_DOH\\_\(0071\)\\_Decision\\_10-02-10\\_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i375/Thornton_v_IC_&_DOH_(0071)_Decision_10-02-10_(w).pdf)

Commissioner is not persuaded that the disclosure of this information fully satisfies this public interest in transparency but accepts that this does reduce its weight.

74. The public authority has also explained that the public interest in transparency is also mitigated by the limits of the scope of the withheld legal advice. It would not increase transparency on the decision's contents, the sums involved, the policy reasons, or the fact that the public authority was advised the action was lawful (all of which are already known) but only about the legal consideration taken into account by it in determining whether it had vires to make the payments. The Commissioner's view is that the disclosure of the legal advice would add to the accountability of the public authority in relation to the considerations it had taken into account when considering its vires. He does not accept that the public interest in transparency and accountability can be fully addressed via the release of other related information, but does accept that in the circumstances of this case that this reduces the weight attributable to this factor.

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

75. The Information Tribunal in *Calland v Information Commissioner and the Financial Service Authority* (EA/2007/1036)<sup>8</sup> explained the Tribunal's approach when considering the balance of public interest in this exemption (at paragraph 37):

*'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.'*

76. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. In *Dr Thornton v Information Commissioner* (EA/2009/0071), the Tribunal usefully distilled the High Court's approach into six principles:

1. there is a strong element of public interest inbuilt into the exemption;
2. there need to be equally strong countervailing factors for the public interest to favour disclosure;

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<sup>8</sup>This decision can be found at:

[http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO\\_0136\\_webdecision\\_080808.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf)

3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
  4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
  5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
  6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public 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 has obtained.
77. In this case the Commissioner believes that the strong inbuilt public interest argument concerning the protection of the concept of legal professional privilege is important in this case. He notes when considering the fourth point that this legal advice is still 'live' and this intensifies the strength of protection that is to be expected. This is because the public authority was relying on the legal advice for the issue of donating the overpayments to charity at the time of the request and is still doing so. The legal advice is also recent and therefore the amount of time that has passed has not diminished the protection that should be accorded to it.
78. The Commissioner has had the opportunity of seeing the withheld Information. Clearly he cannot reveal its contents. In his view, however, it does not reveal any of the concerns potentially raised by the complainant, particularly that the public authority may have misrepresented 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 has obtained.
79. The Commissioner has considered the weight of the public interest factors in disclosure but is not convinced that they come close in this case to being equally strong countervailing factors that would override the public interest factors in maintaining the exemption on the circumstances of this case. He has considered that the information may affect to some extent a significant group of people, but believes that that effect would be negligible in the circumstances of this case.

80. For all the reasons above, the Commissioner is therefore satisfied that the public interest in maintaining the application of the exemption outweighs the public interest in its disclosure.
81. He therefore determines that the exemption found in section 42(1) has been applied correctly and dismisses the complaint.

## **Procedural Requirements**

### *Section 10*

82. In this case it took the public authority more than twenty working days to provide a response to the request for information. The Commissioner appreciates that during this time it sought clarification in respect to other requests made in the same correspondence. However, the Commissioner considers each request individually and therefore the failure to provide a response in twenty working days is a breach of section 10(1).

### *Section 17*

83. Section 17(1) of the Act requires a public authority to provide an applicant with a refusal notice stating the basis upon which it has refused the information and issue this notice within the time for complying with section 1(1) of the Act.
84. The Commissioner notes that the public authority did not issue its refusal notice until 8 September 2009. As this was not issued within 20 working days of the request the public authority has breached section 17(1) of the Act.

## **The Decision**

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85. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - *It applied section 42(1) correctly to withhold the relevant recorded information that it held in this case.*
86. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:



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- *It breached section 10(1) in failing to provide a response to the request and confirm the information was held within the 20 statutory day timeframe; and*
- *It breached section 17(1) in failing to issue a refusal notice the within 20 statutory day timeline.*

## **Steps Required**

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87. The Commissioner requires no steps to be taken.

## Right of Appeal

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88. 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 sent.

**Dated the 23<sup>rd</sup> day of August 2010**

**Signed .....**

**Pamela Clements  
Group Manager**

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

## Legal Annex

### Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

Section 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.

#### Section 10 - Time for compliance with request

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.

...

## **Section 17 - Refusal of Request**

Section 17(1) provides 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 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.

...

## **Section 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.

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