

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 March 2011

Public Authority: Buckinghamshire County Council
Address: County Hall
Walton Street
Aylesbury
Buckinghamshire
HP20 1UA

Summary

The complainant requested the cost of external support and a copy of any documented reasoning for the withdrawal of the appeal by the public authority in relation to a previous ICO Decision Notice. The public authority provided some of the information but refused the rest on the basis of the exemption contained at section 42 of the Freedom of Information Act. The Commissioner finds that the public authority correctly applied section 42 and does not require any steps to be taken.

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

2. This complaint is linked to the Commissioner's Decision Notice in case reference number FS50160381, which was appealed by the public authority.

The Request

3. On 17 March 2010 the complainant submitted the following request:

"Finally, as a separate request, you are aware that Bucks CC appealed the ICO's (FS50160381) decision to disclose 11+ data. This was recorded as Appeal EA/2009/0048. Bucks County Council subsequently withdrew this appeal. Prior to withdrawal, the council hired external legal support. I would like therefore to know:

- 1. How much was spent on external support (e.g. legal support) in preparing the withdrawn appeal*
- 2. Any documented reasoning for the withdrawal of the appeal."*

4. Buckinghamshire County Council (the Council) provided a response to the complainant on 19 March 2010 in which it provided the information requested at part one but refused to disclose the information requested at part two on the basis of the exemption contained in section 42 – Legal professional privilege.
5. The complainant requested an internal review of the public authority's decision on 19 March 2010.
6. The Council did not respond to the internal review request. The complainant sent follow up emails to the Council dated 30 March 2010, 6 April 2010 and 4 May 2010 before contacting the Commissioner.
7. The Commissioner wrote to the Council on 7 July 2010 and again on 20 July 2010 asking that it carry out the requested internal review.
8. On 13 August 2010 the public authority responded with the details of the result of the internal review it had carried out. The Council upheld its original decision to refuse the request on the basis of the exemption contained in section 42.

The Investigation

Scope of the case

9. On 18 August 2010 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:

- The Council's application of section 42
- The delay in carrying out the internal review

Chronology

10. In a letter dated 18 August 2010 the Commissioner informed the Council about the complaint and asked that it provide him with a copy of the withheld information and supporting arguments for the application of section 42.
11. The Council responded to the Commissioner on 31 August 2010 providing a copy of the withheld information.

Analysis

Substantive Procedural Matters

Section 42

12. Section 42(1) of the Act provides an exemption for information that is subject to legal professional privilege. The Commissioner must first assess whether the withheld information is subject to legal professional privilege.
13. Legal professional privilege protects the confidentiality of communications between a lawyer and client. The Information Tribunal in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* defined legal professional privilege 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, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."
(para. 9)
14. There are two types of legal professional privilege: litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.

15. Legal advice privilege applies where no litigation is in progress or being contemplated. In these cases, communications must be confidential, made between a client and legal advisor acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice. Communications made between an advisor and client in a relevant legal context attract privilege.
16. The public authority advised that section 42(1) was being applied to the information requested as it contained legal advice from its solicitors regarding the appeal against a previous ICO Decision Notice. The public authority also confirmed to the Commissioner that it only held one piece of recorded information because, due to the time constraints of making an appeal, the majority of the contact between the public authority and the external support was via telephone and therefore was not recorded information.
17. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately, and also where disclosure would help further the understanding of issues of the day.
18. After reviewing the requested information, the Commissioner is satisfied that it is subject to legal advice privilege. This is because it is confidential advice provided to the Council by a legal professional, and therefore that section 42 is engaged.
19. However, section 42 is subject to the public interest test. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that: "There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." In summary, legal professional privilege was referred to as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases. The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale.
20. In *Pugh v Information Commissioner and Ministry of Defence* [EA/2007/0055], the Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information "where the privilege holder no longer has a recognised interest to protect". The Tribunal also said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people". In the case of *Shipton v Information Commissioner and the National Assembly for Wales* [EA/2006/0028], a differently constituted

Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information *“when the harm likely to be suffered by the party entitled to LPP is slight, or the requirement for disclosure is overwhelming”* (paragraph 14b).

Public interest test

21. In considering the public interest test in this case the Commissioner recognises that there is a strong public interest in enabling persons to obtain appropriate legal advice and assistance. It is also recognised that it is important for the administration of justice that a client should have free and frank discussions with their lawyers with a high degree of certainty that the instructions given or the discussions that take place or the advices given will not be disclosed without their consent.
22. As a result of the above quoted Information Tribunal decisions on section 42, the Commissioner considers the following factors to favour the maintenance of the exemption in this case:
 - a. The ability to communicate freely and receive advice with internal and external legal advisors in confidence.
 - b. The continued relevance and implications of the matters discussed.
 - c. The likelihood that the advice given in this context will be useful in relation to other subsequent issues.
23. There will always be a strong element of public interest inbuilt into the legal professional privilege exemption. However it is not an absolute exemption and where there are equal or weightier countervailing factors, then the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. Against the arguments for maintaining the exemption in this case, and in line with the decisions of the Information Tribunal, the Commissioner considered the following public interest arguments in favour of disclosure to be of relevance:
 - d. Informing debate on key issues, including allowing the public to feed into key policy decisions, especially those which have wide application in the workings of the public authority.
 - e. Helping people understand and challenge decisions affecting them.
 - f. Promoting accountability for decisions taken.
 - g. The time elapsed since the information was produced, in relation to the matters discussed.

24. In its responses to the Commissioner the public authority argued that while there was a public interest in it being transparent and accountable for the decisions it may take, there was a greater public interest in withholding the legal advice.
25. The public authority argued that the accuracy and quality of the decisions it makes would be affected if legal advice upon which they are based were impaired by a lack of candour between the public authority and its lawyers. The public authority further argues that the possibility that those advices may be disclosed into the public domain would result in inaccurate or impaired advices which could lead to wrong decisions being made and to expensive litigation which may result in a cost to the public purse.
26. The Commissioner accepts that transparency and accountability are strong public interest arguments favouring the release of the legal advice.
27. In the Tribunal decision of *Pugh v The Information Commissioner (The Ministry of Defence)*(EA/2007/0055) the Tribunal noted that the public interest test is that set out in section 2(2)(b) of the Act which requires that:

"...in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information..."

The Tribunal also noted in the *Pugh* decision that there was almost an inbuilt public interest in maintaining the exemption because of the recognised need for candour between the lawyer and his or her client. The Tribunal also pointed out that in considering the public interest test the Commissioner should consider the public interest in the circumstances of the case under consideration.

28. In this particular complaint the Commissioner notes that the public authority has relied on the need and importance for candour between the public authority and its legal advisors. The Commissioner notes the point made by the public authority as to the possible consequences should that relationship which is based on candour and confidence be impaired because of the possible disclosure of legal advice given.
29. The Commissioner also takes into consideration the point made by the complainant that the issues which gave rise to the public authority seeking legal advice, with regards to its appeal against an ICO Decision Notice, should be released in the spirit of openness and transparency. However the Commissioner considers that whilst the disclosure of the

information is of importance to the complainant in this case in considering the public interest the Commissioner must take into account that publication of the information under the act is to the public at large. Therefore the Commissioner must take into account whether or not there are issues arising within the circumstances of this complaint which would be of importance to the wider audience.

30. The information which has been withheld is in the form of legal advice sought in October 2009 concerning an appeal against an ICO Decision Notice. The Commissioner having read the advice is satisfied that there are no issues which are of public concern or interest which should be placed in the public domain for public scrutiny or would advance democracy or inform public debate over and above what is already known. The Commissioner has also given weight to the fact that the advice was only five months old at the time of the request and may be relied upon in the future.
31. The Commissioner considers all of the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. This is particularly the case in terms of informing the debate on the key issues to which the information relates and promoting transparency for decisions taken.
32. However, in the circumstances of this particular piece of information, the Commissioner considers that the arguments for disclosure are outweighed by the arguments in favour of maintaining the exemption under section 42. This is based on the Commissioner's analysis of the content and context of the information he viewed to which section 42 applies, from which he reached the following conclusions:
 - The harm likely to be suffered by the party entitled to LPP, as a result of disclosure, would not be slight.
 - The communications were/are confidential
 - The communications were made for the sole purpose of obtaining legal advice
 - The communications were made between a professional legal adviser and their client (the Council)
33. The Commissioner has therefore concluded that in this case the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption.

The Decision

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

Steps Required

35. The Commissioner requires no steps to be taken.

Other matters

36. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

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 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

37. 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 sent.

Dated the 10th day of March 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 42 Legal professional privilege

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) 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.