

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 September 2011

Public Authority: Department for Communities and Local Government
Address: Eland House
Bressenden Place
London
SW1E 5DU

Summary

The complainant requested copies of the legal advice sought by the Department for Communities and Local Government ("DCLG") relating to the issue of whether Energy Performance Certificates for private dwellings contain personal data according to the definition in the Data Protection Act 1998 ("the DPA"). DCLG withheld the legal advice using section 42(1) of the Freedom of Information Act 2000 ("the FOIA"). It said that the public interest did not favour disclosure. The Commissioner investigated and decided that the legal advice had been correctly withheld. He does not require any steps to be taken. The Commissioner also found a breach of section 17(1) of the FOIA.

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 FOIA. This Notice sets out his decision.

The Request

2. I understand that on 26 June 2010, the complainant requested information in the following terms:

*"On page 9 of the document 'Making better use of energy performance data: Impact Assessment' published 2 March 2010:
We have performed a Privacy Impact Screening in accordance with the guidance from the Information Commissioners Office. Taking into*

consideration the responses to the consultation, we will undertake a small scale Privacy Impact Assessment to consider and manage the risks of sharing potentially personal data, in advance of implementing the data strategy'.

Can I have copies of:...

- (3) *Any legal advice or opinions relating to the determination and the extent that EPCs of houses at the point of sale (or at any other time) are 'potentially personal data' within the meaning of the Data Protection Act".*
3. When DCLG failed to respond to the request, on 4 January 2011, the complainant asked the Council to confirm whether or not this information was held.
 4. DCLG replied the next day and said that it had sought legal advice on the issue.
 5. On 14 January 2011, the complainant wrote to DCLG and reiterated his request for a copy of the relevant legal advice
 6. On 19 January 2011, DCLG stated that the legal advice was exempt under section 42 of the FOIA. It stated that the public interest favoured maintaining the exemption.
 7. On 3 February 2011, the complainant requested an internal review.
 8. DCLG completed its internal review on 3 March 2011 and stated that it wished to maintain its position that the legal advice was exempt.

The Investigation

Scope of the case

9. On 31 March 2011, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether DCLG had correctly withheld the legal advice using section 42(1).

Chronology

10. From 6 June 2011 to 15 July 2011, the Commissioner corresponded with the complainant and the council to further his enquiries.

Analysis

Exemptions

Section 42(1) Legal Professional Privilege

11. This exemption 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.
12. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). In this case, DCLG sought to rely on advice privilege.
13. DCLG confirmed that the withheld legal advice had been provided by two solicitors and two barristers working at DCLG. Having inspected the withheld information, the Commissioner was satisfied that it consisted of legal advice provided by legally qualified persons. He was also satisfied that there was no evidence to indicate that the information had been shared to such an extent that it would no longer be considered to be confidential.

Public interest arguments in favour of disclosing the requested information

14. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
15. In this case, the Commissioner appreciates that disclosure of the legal advice would help the public to understand more about DCLG's decision making process in relation to this particular issue.

Public interest arguments in favour of maintaining the exemption

16. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry*

(EA/2005/0023), the Information Tribunal described legal professional privilege as, “a fundamental condition on which the administration of justice as a whole rests”.

17. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner’s published guidance on legal professional privilege states the following:

“Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice”.

18. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.

19. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

“...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...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...”

20. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

21. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is not the Commissioner’s view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the authority’s right to consult with its lawyers in confidence.

22. DCLG explained to the Commissioner that it first sought legal advice when it received requests for address-level Energy Performance Certificate data. DCLG wanted to consider whether it would be possible to make the data available. There was a particular focus on establishing whether the disclosure would breach the Data Protection Act 1998 ("the DPA") as Energy Performance Certificates contain property addresses. However, DCLG also explained that the Energy Performance of Buildings Regulations currently prohibit disclosure of the Energy Performance Certificate except as set out in the Regulations. Therefore, even if the address was not personal data, it could only be released to a prescribed list of people. DCLG said that in the interests of transparency, it consulted last year on amending the Regulations so that data could be made more widely available. A clause was included in the Energy Bill which is at the House of Commons Committee stage at the time of writing this notice. Assuming the clause receives parliamentary approval, DCLG propose to consult again later this year and amend the Regulations next year.
23. Generally speaking, the value in withholding information diminishes over time. The Commissioner notes that in this case, the legal advice covers a period from 2007 to 2010. It is still therefore relatively recent and it is apparent that it is still being relied upon. The complainant said that he believes that there is no prospect of any legal proceedings and because of that maintaining the exemption is unreasonable. The Commissioner does not agree with the complainant's argument. Firstly, it is not correct that there is no prospect of any legal challenge. One way this could arise is through a complaint to the Commissioner and the Tribunal for example, regarding the disclosure of the information. Furthermore, legal advice privilege exists to maintain the confidential relationship between a lawyer and their client and the public interest in maintaining that remains a strong one, even if there is a low likelihood of future legal challenges.
24. It appears that the complainant wishes to question DCLG's position that the addresses constitute personal data according to the Data Protection Act 1998 ("the DPA"). The Commissioner would observe that if a member of the public wishes to access information held by a public authority, there is a statutory route available to have those matters considered through his office. There is also the opportunity for further independent scrutiny of any decision taken through the First-Tier Tribunal (Information Rights). The Commissioner also notes that DCLG is currently exploring possibilities for bringing about further transparency, and will be consulting on the issues, as described above. In the Commissioner's view, these circumstances mean that the public interest in disclosure of the legal advice is limited in this case.

25. The Commissioner would also observe that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no obvious sign of unlawful activity, evidence that DCLG had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
26. The Commissioner understands that the complainant has concerns about the action taken by DCLG however it is not the Commissioner's role in this context to debate the merits of those actions. The Commissioner must consider whether there are sufficient circumstances in this case that would warrant an unusual level of transparency. In all the circumstances of the case, the Commissioner was of the view that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

Procedural Requirements

27. The Commissioner noted that DCLG failed to issue a refusal notice relying on section 42(1) within 20 working days of the request. This was a breach of regulation 17(1).

The Decision

28. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the FOIA:
 - It correctly relied on the exemption under section 42(1) and it correctly determined that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
29. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:
 - DCLG breached section 17(1) of the FOIA because of its failure to rely on the exemption under section 42(1) within 20 working days of the request.

Steps Required

30. The Commissioner requires no steps to be taken.

Right of Appeal

31. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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 13th day of September 2011

Signed

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

Legal Annex – Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

“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.”

Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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.”

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."

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."