

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2013

Public Authority: The Chief Constable of Hampshire Police
Address: Hampshire Constabulary
Police Headquarters
West Hill
Romsey Road
Winchester
Hampshire
SO22 5DB

Decision (including any steps ordered)

1. The complainant requested information relating to Counsel's opinion on a specific area of law.
2. Hampshire Constabulary (the Constabulary) refused to disclose the requested information, citing section 42 (legal professional privilege).
3. The Commissioner's decision is that the public interest favours the maintenance of the exemption and therefore the Constabulary correctly withheld the information. He requires no steps to be taken.

Request and response

4. Following earlier correspondence, on 7 December 2012 the complainant requested information of the following description:

"...I wish to see Counsel's Opinion which in this case relates to his/her view as to the interpretation of statutory words. This is not the same as Counsel's advice as to how the Chief Constable should act operationally".

5. The Constabulary responded on 9 January 2013. It refused to provide the requested information. It cited the section 42 exemption (legal professional privilege) as its basis for doing so.
6. When requesting an internal review, the complainant told the Constabulary:

"By way of further background, this application concerns mass cycling events in the New Forest in which 1500+ cyclists set off from a common starting point on two courses of between 70 and 100 miles and they are classified at the end of the race according to the time taken to complete the course and thus the speed over the course. The organisers describe the events as 'Sportives' probably in the hope of avoiding the provision of the Road Traffic Act 1998. It is not a word used in the legislation

Section 31 of the Road Traffic Act 1998 makes it a criminal offence to hold a race or a trial of speed between bicycles on the highway. The Cycle Racing on Highways Regulations define a Time Trial and a Bicycle Race. Neither the Act nor the Regulations define a Trial of Speed between bicycles.

I agree that a 'Sportive' cycling event is neither a race nor a time trial – the issue is whether it is a trial of speed between bicycles and whether [name redacted] instructed Counsel to advise on this point or whether he/she did in fact advise on the point".

7. Following an internal review, the Constabulary wrote to the complainant on 4 March 2013. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 13 March 2013 to complain about the way his request for information had been handled. He told the Commissioner:

"I do accept that Counsel's Opinion is generally the subject of LPP which is not absolute..... I contend that privilege has been lost due to dissemination of the advice/opinion and that public interest in disclosure outweighs public interest in withholding the material".

9. The Commissioner considers the scope of his investigation to be the Constabulary's application of section 42 (legal professional privilege).

Reasons for decision

Section 42 legal professional privilege

10. Section 42(1) of FOIA says 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."

11. In other words, section 42 sets out an exemption from the right to know for information protected by legal professional privilege (LPP).
12. The principle of LPP is based on the need to ensure that communications between a client and his or her legal adviser will be treated in confidence and not revealed without the client's consent. It is considered to be a fundamental requirement of the legal system that a client can speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice based on full knowledge of all the relevant circumstances of the case.
13. The Commissioner recognises that there are two types of privilege within LPP, litigation privilege and advice privilege. The Constabulary confirmed that it considers that legal advice privilege applies in this case.
14. In order for information to be covered by LPP, the communications must be:
 - confidential;
 - made between a client and professional legal adviser acting in their professional capacity and;
 - made for the sole or dominant purpose of obtaining legal advice.
15. The Constabulary told the complainant:

"The information you have requested relates to legal advice commissioned by the force in respect of a specific issue".
16. The Commissioner understands that the Constabulary (the client) sought legal advice from Counsel (the professional legal adviser) on a specific area of law raised by the complainant. The advice sought was confidential and the sole purpose of the communications was to obtain and provide legal advice. The advice meets all three conditions and the Commissioner is therefore satisfied that it is subject to advice privilege.

Has privilege been waived?

17. As the Commissioner is satisfied that the requested information is covered by legal professional privilege, it is necessary for him to consider whether the Constabulary has waived its right to claim such privilege to the information.
18. Privilege belongs to the client, in this case the Constabulary. Only the client can waive privilege. It is generally considered that a public authority has waived its right to claim privilege if it has shared, copied or disclosed privileged information to the public or to another party free of restriction.
19. In the complainant's view privilege has been waived and therefore the exemption in section 42(1) is not applicable in this case. He told the Constabulary:

"I say that privilege has been waived by disclosure of the salient points of the advice to [name redacted] in a letter dated 7 August 2012 from the Force Solicitor. ...the letter disclosed to him [the recipient] the main points of Counsel's advice without any restriction as to confidentiality".
20. In response, the Constabulary disagreed that privilege had been waived. The Constabulary also told the complainant:

"Whilst the specific information you have requested is exempt from disclosure by virtue of section 42, I can confirm that the advice received by the force supports the constabulary position that the 'Sportive' is neither a time trial nor a race".
21. During the course of his investigation, the Commissioner was provided with a copy of the letter dated 7 August 2012.
22. In correspondence with the Commissioner, the Constabulary said:

"The advice was not disclosed to [name redacted] but reference was made to the advice in the letter.The letter obliquely refers to the advice but does not give details of the full contents of the advice".
23. Having considered the matter, the Commissioner is satisfied that the Constabulary has not waived its right to claim privilege in this case. He has reached this conclusion on the basis that the letter, albeit containing a summary of the legal advice, does not reveal its content or substance. It follows that the Commissioner is satisfied that the exemption is engaged.

The public interest

24. Having established that the section 42 exemption is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

25. The Constabulary acknowledged that disclosure in this case would increase transparency and demonstrate *"that the force is acting appropriately in the light of legal counsel"*.

26. The complainant told the Constabulary:

"The public interest lies in safety of other road users on the narrow and badly aligned roads of the New Forest which is a National Park, one of the principal features of which are the ponies, cattle, sheep and pigs which wander freely on the local roads, together with riders, ramblers and family groups".

Public interest arguments in favour of maintaining the exemption

27. In the Constabulary's view:

"The client's ability to speak freely and frankly with its legal adviser in order to obtain an appropriate legal advice is a fundamental requirement of the English law system and the concept of LPP protects the confidentiality of these communications".

28. In favour of maintaining the exemption, the Constabulary told the complainant:

"The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP".

29. It also told him:

"Without the assurances around confidentiality and the ability of counsel and client to share information and advice with the utmost faith that these exchanges will remain confidential, this principle is weakened and compromised".

Balance of the public interest

30. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to

disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

31. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In his view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In his view, that principle is fundamental to the administration of justice.
32. Although he considers there will always be an initial weighting towards maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is the case here, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the requested advice were disclosed by reference to the following criteria:
 - how recent the advice is; and
 - whether it is still live.
33. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted after taking the advice.
34. With regard to whether the advice in this case the Commissioner is satisfied that the advice is live and considers that this factor carries significant weight.
35. In favour of disclosure the Commissioner acknowledges the generic arguments of accountability, transparency and furthering public debate.
36. In reaching a conclusion in this case, the Commissioner is mindful that, whilst the in-built weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.

37. Having weighed the public interest factors for and against disclosure, the Commissioner has concluded that, in all the circumstances, the public interest in the maintenance of LPP, and, therefore, in upholding the exemption provided by section 42(1), outweighs the public interest in disclosure. The Constabulary is not, therefore, required to disclose the information in question.

Right of appeal

38. 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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF