

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 November 2015

**Public Authority:** London School of Economics and Political Science

**Address:** Houghton Street  
London  
WC2A 2AE

#### **Decision (including any steps ordered)**

---

1. The complainant has requested from the London School of Economics and Political Science complete copies of all reports produced for it by a firm of accountants and business advisors. The London School of Economics and Political Science has withheld this information under sections 31, 41, 42 and 43 of the FOIA.
2. The Commissioner's decision is that London School of Economics and Political Science has successfully applied section 42 on the basis that the requested information is protected by legal professional privilege.
3. The Commissioner therefore does not require the London School of Economics and Political Science to take any steps.

#### **Request and response**

---

4. On 18 December 2013 the complainant wrote to the London School of Economics and Political Science (the LSE) and requested information in the following terms:

*'It is my understanding that the London School of Economics requested from the forensic accounting firm BDO<sup>1</sup> at least two reports (one*

---

<sup>1</sup> BDO is a national, leading accountancy and business advisory firm.

*preliminary and one final) regarding the cases of forgery of (name redacted)'s signature between 208 and 2010 and the consequential depletion of the Esoclab Research Account (ERA)<sup>2</sup>.*

*I am now aware that these reports contain allegations made by LSE employees regarding failure on (redacted) part to carry out work on LSE projects on which (redacted) was a (redacted). I hereby formally request under the UK Freedom of Information Act 2000, complete copies of all reports produced by BDO for the LSE mentioning (redacted) and containing allegations against (redacted) by LSE employees.'*

5. The LSE responded on 29 January 2014. It stated it was withholding the BDO reports under sections 31, 41, 42 and 43 of the FOIA.
6. On 4 February 2014 the complainant requested an internal review as she was dissatisfied with the LSE's response.
7. Following an internal review the LSE wrote to the complainant on 27 February 2014 and upheld its original decision.

### **Scope of the case**

---

8. The complainant contacted the Commissioner in or about June 2014 to complain about the way her request for information had been handled. In particular, the LSE's decision to withhold the requested information under sections 31, 41, 42 and 43 of the FOIA.

### **Chronology**

---

9. On 2 October 2014 the Commissioner contacted the LSE and requested copies of the withheld information together with any arguments it wanted to advance in support of its application of the FOIA exemptions cited.

---

<sup>2</sup> <http://esoclab.eu/>

<http://esoclab.eu/about-us/>

10. The LSE responded on 30 October 2014 and provided the Commissioner with copies of the withheld information together with some arguments in support of its decision to apply the exemptions in the FOIA.

## **Reasons for decision**

---

11. The Commissioner has seen the withheld information which comprises of two reports produced for the LSE by its auditors BDO; an original one dated 22 June 2012 and an addendum dated 10 July 2012.
12. The LSE has applied the exemptions under sections 31, 41, 42 and 43 of the FOIA in support of its decision to withhold this information.
13. The Commissioner will firstly deal with the exemption under section 42 of the FOIA.

## **Section 42(1) of the FOIA – Legal Professional Privilege**

14. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. This exemption is subject to a public interest test.
  15. There are two types of privilege – litigation privilege and legal advice privilege.
  16. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
  17. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, 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.
  18. The Commissioner's Guidance<sup>3</sup> on section 42 of the FOIA makes it clear that information meets the criteria for engaging the category of litigation privilege:
- 

<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

- a. where litigation is underway or anticipated. Where litigation is anticipated there must be a real prospect or likelihood of litigation taking place; it is not sufficient that litigation is merely a fear or possibility;
  - b. the dominant (or main) purpose of the communications must be to give or obtain advice to assist in preparing for litigation;
  - c. and the communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
19. As stated above, the withheld information comprises of two reports produced by BDO dated 22 June and 10 July 2012 respectively at the request of the LSE's lawyers to enable them to advise on the issues and actions to be taken.
  20. These reports were produced following an investigation started by BDO in February 2012 into allegations of fraud by members of the LSE's staff. Both reports are expressly marked 'strictly private and confidential' and 'privileged, having been prepared in contemplation of litigation and/or for the dominant purpose of fighting adversarial proceedings in contemplation of litigation'.
  21. Both reports contain the BDO's findings following its investigations into allegations of fraud committed by a number the LSE's staff.
  22. The LSE through their solicitors has stated it considers that both of the BDO reports are subject to legal professional privilege on the basis of litigation privilege. The LSE and its solicitors instructed BDO to prepare the two reports to enable its solicitors to provide advice on the issues and matters that were pertinent to the investigation being carried out and to advise on further action including, in particular, litigation. The LSE has added that BDO reports were provided expressly to enable its solicitors to ascertain and advise if there was any wrongdoing, to consider whether it should bring recovery action against any individuals and to provide evidence in preparation for potential litigation. The LSE has confirmed that the potential for litigation is very much a live issue both now and at the date of the request.
  23. The complainant does not accept that the BDO reports relate to an ongoing investigation or indeed a live issue with the potential for litigation. The complainant has referred to the fact that the reports were

produced some time ago in 2012 and related to an internal administrative enquiry which was now concluded. The complainant has also pointed out that no litigation has been commenced to date.

24. The Commissioner accepts the LSE's explanation as to the circumstances in which the withheld information was obtained. Having reference to his own guidance as to what information may attract litigation privilege, he is satisfied, too, that the information described is subject to legal professional privilege on the basis of litigation advice. It is clear to the Commissioner that the BDO reports were obtained for the purpose of litigation advice on the instructions of the LSE's solicitors. The Commissioner also accepts that the matters referred to in the BDO reports relate to issues that were live at the date of the request and remain live to date.
25. The Commissioner is therefore satisfied that the section 42(1) exemption was correctly engaged in relation to litigation privilege.

### **The public interest**

26. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case. In forming a conclusion here, the Commissioner has taken into account the general public interest in the openness and transparency at the LSE and the public interest in the maintenance of legal professional privilege, as well as those factors that apply in relation to the withheld information in question.

### **Factors in favour of disclosure**

27. The complainant has stated she has a personal interest in the withheld information in so far as it may refer to allegations against herself and her husband.
28. Having viewed the withheld information, the Commissioner accepts that there is public interest in its disclosure. This would result in the public being better informed as to investigation by the LSE into alleged fraud by its staff.

### **Factors in favour of maintaining the exemption**

29. However, the Commissioner also believes that there is public interest in allowing the LSE to obtain legal advice regarding its position where litigation is a realistic possibility. A key reason for the existence of legal professional privilege is to enable a client to obtain confidential advice. It is also necessary to take into account the inbuilt public interest in this

exemption; that is the public interest in the maintenance of legal professional privilege.

30. This inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt 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..."* (Paragraph 35).

31. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
32. The public interest arguments advanced by the LSE in this case relate to the inbuilt public interest in the maintenance of legal professional privilege. The LSE also referred to the legal advice relating to a matter which was live at the time of the request and one which remains live at the time of this Decision Notice.
33. The complainant's arguments focus on her personal interest in the withheld information which she believes may contain allegations concerning herself and her husband.
34. The view of the Commissioner is that the public interest inbuilt into this exemption is particularly weighty in this case as the legal advice relates to a matter was live at the time of the request.
35. The Commissioner recognises that there is a public interest in transparency in relation to the way the LSE investigates its internal activities. However, he does not believe this is sufficient to outweigh the inherent public interest in legal professional privilege.
36. The Commissioner concludes that the public interest in the maintenance of legal professional privilege in upholding the exemption provided by section 42(1) outweighs the public interest in disclosure. Accordingly,

the LSE is not, therefore, required to disclose the information in question.

37. As the Commissioner is satisfied that section 42(1) has been successfully applied by the LSE he has not gone on to consider sections 31, 41, and 43 of the FOIA.

## 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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 .....**

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