

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2015

Public Authority: College of Policing
Address: 10th Floor Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Decision (including any steps ordered)

1. The complainant requested legal advice received by the College of Policing (the College) on the issue of making the "disapproved register" of former police officers publicly available. The College refused to disclose this information under the exemption provided by section 42(1) (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the College cited section 42(1) correctly and so it was not obliged to disclose this information.

Background

3. The request refers to the "disapproved register". The College website¹ describes this as follows:

"The College of Policing's Disapproved Register became effective from 1st December 2013. Since then police forces have been providing details of those officers who have been dismissed from the service or who either resigned or retired while subject to a gross misconduct investigation where there would have been a case to answer.

¹ <http://www.college.police.uk/News/College-news/Pages/Disapproved-Register-.aspx>

All 43 forces across England and Wales, as well as British Transport Police and Ministry of Defence Police, provided names to the College of Policing to include on the register."

Request and response

4. On 7 January 2015, the complainant wrote to the College and requested information in the following terms:

"(1) Please provide copies of the minutes of all meetings of the undercover policing reference group.

(2) Please provide copies of all independent legal advice sought in relation to the disapproved register."
5. The College responded on 26 March 2015, outside 20 working days from receipt of the request. In response to request (1), the majority of the information was disclosed. In response to request (2), the College refused to disclose the information requested and cited the exemption provided by section 42(1) (legal professional privilege) of the FOIA.
6. The complainant responded to this on 30 March 2015 and requested an internal review in relation to the refusal of request (2). The College responded with the outcome of the internal review on 23 April 2015. The conclusion of this was that the refusal of the request under section 42(1) of the FOIA was upheld.

Scope of the case

7. The complainant contacted the Commissioner on 24 April 2015 to complain about the refusal of request (2). The complainant argued that the public interest favoured disclosure of the requested information.
8. As noted above, the complainant requested an internal review only in relation to the refusal of request (2). The complainant also only raised the refusal of that request when in correspondence with the ICO and so this notice covers only that request.

Reasons for decision

Section 17

9. Section 17(1) of the FOIA requires that a response notifying a requester that their request has been refused must be sent within 20 working days of receipt of the request. In this case the College failed to abide by this requirement and in so doing breached section 17(1).

Section 42

10. The College cited the exemption provided by section 42(1) of the FOIA. This section provides an exemption for information subject to legal professional privilege. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of the information being subject to legal professional privilege. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
11. Covering first whether the exemption is engaged, there are two types of legal professional privilege (LPP); advice privilege and litigation privilege. In this case advice privilege is claimed, which is described in the Commissioner's published guidance on this exemption² as follows:

"Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice."
12. As the wording of the request suggests, the information within its scope, and hence in question here, is legal advice. It is advice provided from a lawyer to a client (the College) on the subject of the disapproved register being made public. Clearly this information is subject to LPP and, therefore, the exemption provided by section 42(1) is engaged.
13. The next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the openness and transparency of the College and the public interest in the maintenance of LPP, as well as those factors that apply in relation to the specific information in question here.

² https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

14. Dealing first with factors in favour of disclosure, the complainant argued that the public interest favoured disclosure in order to enable the public to understand why the disapproved register remains unpublished. He argued that disclosure would not disrupt the process of providing legal advice as long as the advice that had been provided was "*fair, impartial and professional*".
15. Having viewed the information in question, the Commissioner agrees that there is public interest in its disclosure; this would result in the public being better informed as to the actions of the College in this area and in particular why the disapproved register remains unpublished. However, the Commissioner also believes that there is public interest in the College ensuring that publication of the register is legally compliant. This weighs against the public interest identified by the complainant, as disclosure that disrupts the process of the College obtaining legal advice would make it more difficult for the College to act in a legally compliant manner.
16. As to the complainant's argument about the legal advisors having nothing to fear through disclosure, the effect on the advisors is not the only, or even primary, reason for the existence of LPP. It also exists to enable a client to obtain confidential advice. The Commissioner assumes that the advice provided in this case was fair, impartial and professional, but does not agree with the complainant that this means that the public interest inherent in the exemption covered below is any less weighty as a factor in this case.
17. As to the public interest in favour of maintenance of the exemption, in any case where section 42 is found to be engaged, it is necessary to take into account the inbuilt public interest in this exemption; that is the public interest in the maintenance of LPP. The 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).
18. 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.

19. The public interest arguments advanced by the College in this case related to the inbuilt public interest in the maintenance of LPP. It also referred to the legal advice in question being on a live issue – the matter of how to legally make the disapproved register public remains unresolved.
20. The complainant referred to a case where historical legal advice was ordered to be disclosed and suggested that indicated that the information in question in this case should also be disclosed. The Commissioner, however, agrees with the College that the case referred to by the complainant is not a valid comparison to this case. The legal advice in that case related to an issue that was long resolved, in contrast to this case where the advice relates to an issue that is ongoing. 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 that is ongoing.
21. The Commissioner concludes that 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 College is not, therefore, required to disclose the information in question.

Other matters

22. The Commissioner notes that in this case it appears that the same individual carried out the internal review as was signatory to the refusal notice. The view of the Commissioner is that, for an internal review to be effective, it should be carried out by someone who was not involved in the earlier decision to refuse the request.

Right of appeal

23. 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

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

24. 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.
25. 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