

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 January 2018

Public Authority: The Chief Constable of South Yorkshire Police
Address: Information Compliance Unit
Professional Standards Department
Unit 20 Sheffield
35A Business Park
Churchill Way
Sheffield.
S35 2PY

Decision (including any steps ordered)

1. The complainant requested from South Yorkshire Police the communications between David Crompton and his legal team at the Hillsborough inquests that the Independent Police Complaints Commission (IPCC) claimed they were unable to access for their investigation. South Yorkshire Police withheld the requested information under Sections 42(1), 31(1) and 40(2) of the FOIA.
2. The Commissioner's decision is that South Yorkshire Police has correctly applied Section 42(1) of the FOIA. Therefore, no steps are required.

Request and response

3. On or about 3 November 2016 the complainant wrote to South Yorkshire Police (SYP) and requested information in the following terms:

"In relation to this story on the BBC News website:

<http://www.bbc.co.uk/news/uk-england-merseyside-37634288>

Please send me copies of the communications between David Crompton and his legal team at the Hillsborough inquests that the IPCC claim to have been unable to access for the investigation referred to in the article". If this request is not clear enough and you are unable to identify the information I am seeking please contact me to discuss further. Similarly, if you feel that the work involved in locating the information

requested would exceed the appropriate limit, please discuss this with me and I can attempt to narrow my request”.

4. SYP responded on 17 November 2016. It stated that it held the requested information but was withholding it in its entirety under Section 42(1) of the FOIA.
5. On 12 December 2016 the complainant requested an internal review. He questioned whether all of the requested information attracted legal professional privilege and invited SYP to consider the possibility of making a partial disclosure. The complainant also questioned SYP’s balancing of the public interest factors.
6. In the absence of a response, the complainant chased SYP on 22 January, 25 January, 7 February and 17 March 2017.
7. SYP eventually responded on 28 March 2017 and apologised for the delay. It stated that it was upholding its original decision on the basis that the requested information was covered by litigation privilege under Section 42(1) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 27 April 2017 to complain about the way his request for information had been handled.
9. He challenged SYP’s application of Section 42(1) of the FOIA on three grounds. Firstly, he did not believe litigation privilege applied as the Hillsborough Inquests were not litigation. Secondly, SYP did not give adequate consideration to the strong countervailing public interest factors in favour of disclosure. Finally, SYP did not appear to give any consideration to making a partial disclosure.
10. The complainant also raised other issues including submitting a request online using SYP’s website and the delay in handling his internal review request. In relation to making a request via the website, the complainant pointed out that the online form did not provide the requestor with a copy of their request or a confirmation of receipt. In relation to the internal review, the complainant said this had taken 72 working days to complete.

Chronology

11. The Commissioner contacted SYP on 14 August 2017 to request a copy of the withheld information together with any further arguments it wished to raise in support of its application of Section 42(1) of the FOIA.

She also requested an explanation for the delay in carrying out the internal review.

12. SYP responded on 11 September 2017 and stated that due to the new criminal cases brought in relation to Hillsborough disaster¹ the requested information would have to be reassessed to ensure that those new cases were not compromised. SYP added that it was awaiting a response from the Crown Prosecution Service in relation to any further exemptions which might apply to the requested information.
13. SYP contacted the Commissioner on 10 October 2017 and provided her with a copy of the requested information. It also stated that due to the new criminal prosecutions, it was applying the additional exemptions under Sections 31(1)(b) & (c) and 40(2) of the FOIA.
14. The Commissioner contacted SYP on 7 November 2017 to clarify whether it wished to apply both advice and litigation privilege to the requested information.
15. SYP responded on 4 December 2017 and stated it was applying advice privilege to the entirety of the requested information.

Reasons for decision

Section 42 – legal professional privilege

16. Section 42(1) of the FOIA states 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".

17. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) 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

¹ http://www.cps.gov.uk/news/latest_news/hillsborough-charging-decisions/

imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation”.

18. There are two types of privilege: 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal 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. Communications made between adviser and client in a relevant legal context will therefore attract privilege.
19. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
20. The withheld information in this case consists of various documents, including emails, file/telephone notes and spreadsheets. SYP has confirmed that the entirety of this is being withheld on the basis of legal advice privilege.

Legal advice privilege

21. This has been claimed in respect of the entirety of the requested information. SYP has advised that this information concerns: *“confidential communications between the Force Solicitor and Chief Constable made for the dominant purpose of giving legal advice”.*
22. The Commissioner has viewed the information and is satisfied that it is between the parties stated.
23. In respect of this information, the Commissioner is satisfied that all of it represents legal advice provided to a client by their legal adviser. The Commissioner is further satisfied that there is no available evidence to suggest that the information has lost its confidentiality by entering the public domain. Consequently the Commissioner accepts that the withheld information attracts legal professional privilege on the grounds cited, and that on this basis Section 42(1) of the FOIA is engaged.

Litigation privilege

24. SYP has no longer relied on litigation privilege as a reason for withholding the requested information. Accordingly, the Commissioner has not considered this.

The public interest test

25. As a qualified exemption, Section 42(1) of the FOIA is subject to a public interest test. The information must therefore be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.
26. Both SYP and the complainant have submitted arguments in relation to legal advice privilege which the Commissioner has considered below.

Public interest arguments in favour of disclosure

27. 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. This is particularly so regarding a case of such high public significance. The Commissioner accepts that any information which relates to the Hillsborough tragedy remains of considerable public interest.
28. In the complainant's internal review request dated 12 December 2016 he acknowledged;

".....that the section 42 exemption may be engaged for at least some of the material in question, but I would like a reconsideration as to whether all of the communications in question would realistically attract legal professional privilege"

I disagree with your balancing of the public interest factors for and against disclosure. Given the high profile nature of this issue, the length of time the families involved had to wait for justice and the sheer number of people affected by the behaviour of the Police throughout the entire period of time, I would say that the public interest in disclosure of this information outweighs the public interest in maintaining the exemption".

29. SYP itself has acknowledged that there is:

"... a legitimate and significant public interest in the former Chief Constable's legal conduct at the Hillsborough Inquests. This has been subject to public debate following the Inquests' conclusion and the IPCC's announcement that they will not be investigating a complaint against the former Chief Constable in relation to his legal conduct. Disclosure would be seen as embracing an ethos of

openness, accountability and transparency, as well as furthering understanding of the Force's decision making and approach to the Inquests. Disclosure at this time would further inform the public debate and comment in 'real time'. Additionally, the Inquests have now concluded, therefore any advice is not 'live'".

30. It has also acknowledged:

"In this case, the public interest arguments in favour of disclosure are considerable. The Hillsborough Inquests are a matter of great public interest and, considering the history of the Hillsborough disaster and the criticisms directed towards the Chief Constable following the conclusion of the Inquests, accountability and transparency of decision making regarding the Force's handling of the Inquests weighs strongly in favour of disclosure".

Public interest arguments in favour of maintaining the exemption

31. SYP has argued:

"There is a substantial inherent public interest in the section 42 exemption which protects the principle of legal privilege. The principle safeguards the confidentiality and openness of all legal or legally related communications and exchanges between legal advisor and client thus ensuring access to full and frank legal advice, which in turn is fundamental to the wider administration of justice. If communications between legal advisor and client were routinely disclosed there would be a disincentive to seek legal advice and advice may be diminished due to the fear of it being disclosed. The communications relate to the fresh Hillsborough Inquests which are comparatively recent and surrounding issues that some communications touch upon, such as the ongoing IPCC and criminal investigations, are still ongoing".

32. It has added that:

"The Chief Constable's ability to communicate freely and frankly with legal advisors in confidence and receive advice in confidence is vital. Wider than that, the ability to access full and frank legal advice is a fundamental cornerstone to the British legal system. Additionally, whilst the Inquests have now concluded, the advice is recent and still current. Further, some communications touch on issues that are linked to the Hillsborough investigations, which are still ongoing".

33. SYP also stated in its submission to the Commissioner that:

"The public interest in maintaining Legal Professional Privilege has been supported by [her] in a recent decision notice, FS50656780² where she states:

'30. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions, particularly such a high profile situation as here.

31. However, there is a strong opposing public interest in maintaining SYP's right to communicate with its legal advisors in confidence. To outweigh that public interest, the Commissioner would expect there to be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency."

33. Although she appreciates the significant public interest in the disclosure of material relating to Hillsborough, the Commissioner notes that where possible, disclosure has been made. She has therefore ultimately concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption provided by Section 42(1) has been correctly applied".

34. SYP respectfully submitted that the circumstances of Decision Notice FS50656780 were nearly identical with those in the present case.

Balance of the public interest test

35. The Commissioner has considered the arguments put forward by the complainant, in addition to the stated position of SYP and the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.

36. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions, particularly in such a high profile situation as here.

37. However, there is also a strong opposing public interest in maintaining SYP's right to communicate with its legal advisors in confidence. To outweigh that public interest, the Commissioner would expect there to

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014961/fs50656780.pdf>

be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.

38. Following inspection of the withheld information and consideration of all the circumstances in this case, the Commissioner does not consider that there are factors present that would equal or outweigh the particularly strong public interest inherent in maintaining this exemption and the ability of a body to obtain legal advice in private. It is clear that the legal advice is relatively recent, it is specific and it has not been waived by disclosure. It is also evident that related matters and the relevant advice remain 'live' and, although it was not the case at the time of the request, that new criminal cases are now underway. In such a scenario it is not reasonable that SYP should be required to reveal its legal position in advance.
39. Although she appreciates the significant public interest in the disclosure of material related to Hillsborough, the Commissioner notes that where possible, disclosure has been made. She has therefore ultimately concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption, and that the exemption provided by section 42(1) of the FOIA has been correctly applied to the remaining withheld information.
40. As the Commissioner has found section 42(1) of the FOIA to be properly cited she has not found it necessary to consider the late application of Sections 31(1) and 40(2) of the FOIA. However, she has commented on them below.

Other matters

Circumstances at the time of a request

41. As set out in her guidance on the public interest test³, the Commissioner will usually take into account the circumstances at the time that a request is made when making her decision on a case. However, paragraph 18 of the guidance makes it clear that she has the discretion to take a different approach where events after this time change the balance of the public interest test. Furthermore, in the High Court case of *OGC v Information Commissioner and HM Attorney General [2008]*

³ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

EWHC 737 (Admin), the High Court gave the example of a request which related to criminal proceedings that were commenced after the date of the request and where disclosure would prejudice the fairness of the trial. Although the High Court did not give a definitive ruling, it said that it would be “*undesirable*” for the Commissioner to order disclosure where the information was not exempt at the time of the request but became so thereafter.

42. The High Court went on to say at paragraph 98:

“...it seems to me to be arguable that the Commissioner’s decision whether a public authority complied with Part 1 of the Act may have to be based on circumstances at the time of the request for disclosure of information, but that his decision as to the steps required by the authority may take account of the subsequent changes of circumstances...”

43. Therefore, had the Commissioner decided above that the public interest in disclosure outweighed that in maintaining the exemption in this case, she may have used her discretion to consider the application of Sections 31(1) and 40(2) where later events meant that disclosure might not now be desirable?

Delay in completing the internal review request

44. In this case it took SYP just over 70 working days from 12 December 2016 until 28 March 2017 to respond to the complainant’s internal review request. In the Commissioner’s guidance on internal reviews⁴ she states that an internal review should take no longer than 20 working days in most cases, or 40 working days at most in exceptional cases.

45. The Commissioner reminds SYP of the importance of carrying out internal reviews promptly and in any event within 20 working days unless there are exceptional circumstances.

Right of appeal

46. 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:

⁴ <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

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: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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

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