Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 April 2021

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant has requested information about what constituted a "reasonable excuse" for leaving home during the first Covid-19 lockdown. The Crown Prosecution Service ("the CPS") relied on section 31(1)(c), section 21, section 40(2) and, later, section 42 of the FOIA to withhold all the information it held.

2. The Commissioner's decision is that the CPS is not entitled to rely on section 31(1)(c) of the FOIA in respect of any of the withheld information. Section 42 of the FOIA is engaged, but only in respect of some of the requested information. Where the exemption is engaged, the balance of the public interest favours maintaining the exemption. The Commissioner also finds that the CPS has not discharged its duty under section 1(1) of the FOIA properly as the Commissioner's investigation has identified a further document which falls partially within the scope of the request. As the CPS failed to confirm what information it held and failed to issue a refusal notice, citing all the exemptions on which it later came to rely, within 20 working days, it breached both section 10 and section 17 of the FOIA.

3. The Commissioner requires the CPS to take the following steps to ensure compliance with the legislation.

    - Disclose the information identified in the confidential annexe to this decision notice.

    - Either provide a copy of the "Baxter" case study or issue a refusal notice that complies with section 17 of the FOIA.

4. The CPS must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. On 26 March 2020, in response to the rapidly spreading Covid-19 pandemic, the Government exercised its powers under sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984 to issue regulations aimed at containing the spread of a contagious disease.

6. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("the Regulations"), which Parliament approved, imposed severe restrictions on freedom of movement and assembly – with the police being given powers to enforce those restrictions where necessary. These included the power to close businesses or premises, to fine or to arrest and the power to require all non-essential workers to stay in their homes for the majority of the day.

7. Regulation 6(1) of the Regulations states that:

> *During the emergency period, no person may leave the place where they are living* ***without reasonable excuse****.* [emphasis added]

8. The Regulations were revoked in their entirety on 4 July 2020 – although some of the restrictions they contained have been re-introduced at various points in the intervening period.

Request and response

9. On 12 April 2020, the complainant wrote to the CPS and requested information in the following terms:

> *"Please disclose an electronic copy of all recorded information you hold on the question of what does and doesn't constitute a reasonable excuse under regulation 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020."*

10. The CPS first responded on 12 May 2020. It stated that it considered that section 31 applied to the withheld information and that it required additional time to consider the balance of the public interest. A further, similar, response followed on 9 June 2020.

11. On 7 July 2020, the CPS issued a formal response to the request. It refused to provide any information and relied on sections 31(1)(c), 21 and 40(2) of the FOIA to withhold information.

12. Following an internal review the CPS wrote to the complainant on 4 August 2020. It upheld its original position.

Scope of the case

13. The complainant contacted the Commissioner on 5 August 2020 to complain about the way his request for information had been handled.

14. The complainant did not dispute that the information which the CPS had relied upon section 21 of the FOIA to withhold was reasonably available to him. He later confirmed that he did not wish to challenge the CPS's use of section 40(2) of the FOIA to redact the names of any individuals.

15. On 7 December 2020, the Commissioner commenced her formal investigation with a letter to the CPS, asking for copies of the withheld information and to explain why it considered that section 31(1)(c) would be engaged. The CPS responded on 29 January 2021. It stated that it was re-considering one of the documents that it held for disclosure, but still maintained that section 31 applied to the remaining information. It now also argued that section 42 would be engaged in respect of some of the information.

16. The Commissioner then followed up with some queries around the scope of the request and both the exemptions being applied, which resulted in further rounds of correspondence. With each round, further relevant information was identified.

17. As the CPS has applied section 31 to all of the information, the Commissioner will look at that exemption first. In the event that it is not, or is only partially engaged, she will then consider whether section 42 is engaged in respect of any information not otherwise exempt. The questions for the Commissioner are therefore:

    a. Has the CPS correctly identified the relevant information?

    b. Does section 31 apply to any or all of the withheld information and, if so, does the balance of the public interest favour maintaining the exemption? And, if not;

    c. Does section 42 apply to any of the information not covered by section 31 and, if so, does the balance of the public interest favour maintaining the exemption?

d. Has the CPS complied with the procedural elements of the FOIA?

Reasons for decision

A – Scope

18. Section 1(1) of the FOIA states 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.*

19. At the outset of her investigation, the Commissioner asked the CPS to provide copies of all the information it was withholding. The CPS responded with a 139-page bundle of information.

20. Having reviewed the initial bundle, the Commissioner noted that, whereas the complainant has requested information relating specifically to Regulation 6, some of the information being withheld by the CPS focused exclusively on other parts of the legislation (the term "reasonable excuse", was used, in different contexts, elsewhere in the Regulations). She also noted that the CPS had provided what appeared to be notes prepared to accompany a powerpoint presentation, but not the slides themselves.

21. The Commissioner therefore asked the CPS to reconsider the information it considered relevant to the request and to conduct further searches to establish whether it held the powerpoint slides themselves. The CPS provided a revised bundle of the documents it considered to fall within scope on 19 March 2021. This bundle ran to 84 pages and, this time, contained the powerpoint slides.

22. Having reviewed the new information, the Commissioner noted that the content of this information suggested that yet more information would be held in the form of supporting notes. Having viewed this new document, the Commissioner considered that the information fell within the scope of the request. The CPS initially suggested that this document did not fall within the scope of the request but argued it would be entitled to rely on section 31(1)(c) anyway.

23. The newly supplied document consists of supporting material, provided to presentation delegates, to provide the background to the case studies which formed part of the presentation. The case studies each centred on an individual: one on an individual called "Baxter" and one on an individual called "Smith."

24. Having viewed the information, the Commissioner is satisfied that the "Smith" case study is based on an interpretation of another piece of legislation and thus falls outside the scope of the complainant's request.

25. However, the "Baxter" case study describes a fictious scenario in which a person was issued with a Fixed Penalty Notice for a breach of Regulation 6 of the Regulations. Taken together with the comments in the presentation and accompanying notes, this case study was clearly designed to provoke discussion amongst delegates as to whether the police had acted appropriately – including whether "Baxter's" excuse for being away from home was one that was reasonable in the circumstances.

26. The Commissioner therefore considers that the Baxter case study does fall within the scope of the request and thus the CPS is required to issue a formal response. The CPS is free to rely on an exemption if it wishes, but it should take note of the Commissioner's findings in respect of section 31(1)(c) on the remaining information within scope.

27. Having reviewed the revised bundle, the Commissioner accepts that the information that the CPS has now identified as falling outside the scope of the request has been correctly identified. The single exception is a slide entitled "safeguarding" from a large powerpoint presentation. Whilst this document does not mention "reasonable excuse" specifically, the Commissioner considers that it refers to reasons which might potentially be offered as a reasonable excuse in this context and it thus falls within the scope of the request.

28. In general terms, the withheld information comprises:

    - Powerpoint presentations produced by the CPS, College of Policing and National Police Chiefs' Council on the Regulations.
    - Advice from a private law firm on the Regulations, including some comments from the CPS.
    - A CPS powerpoint on the Regulations
    - Notes accompanying the CPS powerpoint

- Various email chains involving the National Police Chief's Council, College of Policing, Home Office, various police forces and the CPS itself.

B – Section 31: law enforcement

29. Section 31(1) of the FOIA states that:

> *Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
>
> *(a) the prevention or detection of crime,*
>
> *(b) the apprehension or prosecution of offenders,*
>
> *(c) the administration of justice,*

30. The exemption as a whole covers a wide variety of functions that a public authority might possess and which might be detrimentally affected by disclosure of certain information. The scope of the exemption and its purpose was set out in *William Stevenson v Information Commissioner & North Lancashire PCT* [2013] UKUT 0181 (AAC):

> *The words "law enforcement" were in my judgment intended as a broad summary or indication of the scope of and reason for the exemptions in section 31. It is plain from reading the activities listed in s.31(1), and the purposes specified in s.31(2), that they include activities and purposes which go beyond actual law enforcement in the sense of taking civil or criminal or regulatory proceedings. They include a wide variety of activities which can be regarded as in aid of or related to the enforcement of (i) the criminal law, (ii) any regulatory regime established by statute, (iii) professional and other disciplinary codes, (iv) standards of fitness and competence for acting as a company director or other manager of a corporate body (v) aspects of the law relating to charities and their property and (vi) standards of health and safety at work.*

31. The first three limbs refer to the operation of the criminal justice system. The Commissioner's guidance on the exemption accepts that there will often be a degree of overlap between these three limbs. Specifically in relation to section 31(1)(c), her guidance is that it:

> *"could potentially cover information on general procedures relating to the apprehension of offenders or the process for prosecuting offenders."*

32. With section 31, as with all prejudiced-based exemptions, the Commissioner adapts the four-step test set out in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and 0030):

    - One of the law enforcement interests protected by section 31 must be harmed by the disclosure.
    - The prejudice claimed must be real, actual or of substance. Therefore, if the harm was only trivial, the exemption would not be engaged.
    - The public authority must be able to demonstrate a causal link between the disclosure and the harm claimed.
    - The public authority must then decide what the likelihood of the harm actually occurring is, ie. would it occur, or is it only likely to occur?

33. For the higher threshold of "would" occur, a public authority must demonstrate that the harm is more likely than not to occur. For the lower bar of "would be likely to" occur to be met, the public authority does not have to demonstrate that any harm would be more likely than not, but it does have to demonstrate that the chance of harm is more than remote or hypothetical.

34. Whilst it is obviously easier to satisfy the lower threshold of likelihood, satisfying the higher bar will carry more weight in the public interest test.

The CPS's position

35. Having received the CPS's initial submission, the Commissioner considered that it was unclear which of the limbs of the exemption the CPS wished to rely on. She noted that there was scope for some overlap, but asked the CPS to state explicitly which limb(s) it considered would apply. The CPS explained that it considered that section 31(1)(c) was the "most appropriate" limb of the exemption on which to rely.

36. The CPS explained that:

> *"The CPS publishes a large amount of legal guidance on the CPS website in order to be transparent and increase the public understanding of our practices and processes. However, some information needs to be withheld to protect the prosecution process. Disclosure of CPS training material to the world at large including those working for the defence would impede the work of prosecutors and reduce their effectiveness in prosecuting."*

37. In relation to the nature of the prejudice that might occur, the CPS added that:

> *"In particular, disclosure of the information shared with the CPS for the purposes of producing guidance to the police to issue to officers could impact the ability of the police to prevent and detect offences under the Coronavirus Regulations and it is not in the public interest for the CPS to hinder the police in compiling operational guidance for the benefit of police forces so that they may implement the guidance during a health pandemic…*
>
> *"…There is a strong public interest in safeguarding the process whereby the police seek the advice and assistance of the CPS when producing operational guidance for police forces. Maintaining the confidentiality of communications between the Police and the CPS, as well as other public bodies is an essential part of this process. It is important for officials to be able to formulate their views for the benefit of producing such guidance for the wider benefit of society during a health pandemic without fear that those views will later be disclosed into the public domain."*

38. When asked by the Commissioner what the realistic likelihood was that disclosure could hinder the enforcement of a law that had, at the point the CPS responded to the request, already been revoked, the CPS explained that:

> *"Yes, there was a realistic prospect that individuals might be charged with offences whilst Regulation 6 had been in force.*
>
> *"This is because where a breach of the Regulations had been identified the police would need to issue a fixed penalty notice (FPN) and once issued the individual had 28 days to pay. Only after a non-response from an individual would the police compile the case file and issue a charge related to that individual. There were delays both in issuing FPNs and then getting such cases to court; it is likely that a good number of cases under the revoked Regulations were still being considered for charge and were still active. Please also note that, as the offences were summary only, the police had 6 months from the date of an offence to institute proceedings.*
>
> *"Having checked the position with others in the CPS, I have been informed that there are cases related to the Regulations that are still proceeding through the criminal justice system."*

39. In its original submission to the Commissioner, when explaining the nature of the prejudice, the CPS referred to prejudice which "would be likely to occur." However, when asked explicitly by the Commissioner to

confirm the threshold it was relying on, it explained that it considered that the higher bar of "would" prejudice was applicable.

The complainant's position

40. The complainant did not provide any specific arguments as to why he did not consider that prejudice would (or would be likely to) occur. However he did, rightly, point to the vague explanations within the CPS's refusal notice which prevented him from making considered representations on that point. He also noted a lack of clear causal linkage between disclosure and any detrimental effects which might occur. Finally, he drew attention to guidance published by the College of Policing which, he noted, did not appear to have resulted in the prejudicial effects that the CPS claimed would result.

41. On the public interest balance, the complainant noted that there was a strong public interest in citizens being aware of the laws that applied to them – particularly where violation of those laws might result in a criminal penalty.

The Commissioner's view

42. The Commissioner recognises that, whilst there should be a general presumption that criminal offences should be very clearly explained, there will be occasions where police and prosecutors need to have protected conversations in order to ensure compliance with the law. Disclosure of particular policing or prosecution tactics can, in some circumstances, reduce compliance with the law.

43. However, the Commissioner also notes that this determination has to begin with a consideration of the actual information that has been withheld. Having viewed the withheld information in this case, the Commissioner does not consider that the nature of that information would impede the administration of justice.

44. The Commissioner considers that the timing of the CPS's response is key to understanding the likelihood of prejudice occurring.

45. In *Maurizi v The Information Commissioner and The Crown Prosecution Service* [2019] UKUT 262 (AAC), the Upper Tribunal determined that, when considering a qualified exemption, the balance of the public interest should be assessed at the point at which the public authority issues its refusal notice. Whilst the Tribunal's decision only considers the correct timing of the public interest test, the Commissioner considers that the Tribunal's reasoning applies equally to any considerations of the likelihood of prejudice occurring.

46. The complainant's request was made on 16 April 2020. The CPS should have issued its response on 12 May 2020, but it extended the compliance deadline because it needed additional time to consider the balance of the public interest. The CPS did not formally respond to the request until 7 July 2020 and it is this date at which an assessment of likely prejudice must be made.

47. Because the CPS did not respond to the request until three days after the Regulations were repealed, the Commissioner can give very little weight to any arguments relating to the ability of the police to apprehend potential offenders. The police cannot penalise a person for an act which is not an offence at the time it is committed. Whilst the police could, in theory, issue punishments retrospectively, given the punishment was (at that time) a relatively small fine, there would rarely be a public interest in doing so.

48. The CPS noted that, although the Regulations had been revoked at the point it responded, there were, at that time, still a small number of prosecutions working their way through the system arising out of offences that had been committed prior to revocation. However, the Commissioner, having considered the withheld information, can see nothing that would be of any use to an offender who wished to avoid justice.

49. In reaching this conclusion, the Commissioner has also had regard to the information that was already in the public domain at the point the request was responded to. The CPS was keen to note in its submissions that it had already made a great deal of information about reasonable excuses available online – and the Commissioner also notes that the Regulations themselves were updated several times to enshrine new reasonable excuses in law.

50. The Commissioner asked the CPS to identify what information, from the documents being withheld, was not already in the public domain. The CPS's response was that the email chains and the slides were not in the public domain. That of course is strictly true: the documents themselves are not in the public domain – but the substantive information contained within those documents *was* already in the public domain through the various sets of guidance that the CPS and others had published. The right under FOIA is of access to information, not to documents.

51. The points highlighted, both in the slides and the emails, were points that were already considered in published guidance, in contemporary media reports and, in some cases, on the face of the legislation itself. Therefore any prejudice which could conceivably have flowed from disclosure of the withheld information must already have occurred and it is difficult to see why further prejudice would be likely to occur.

52. There is one further matter raised in the email chains which the Commissioner will deal with in a confidential annex in order to preserve a meaningful right of appeal to the CPS. The reason for this is that a comprehensive discussion of this matter cannot take place without extensive reference to the content of the withheld information itself.

53. For the benefit of the complainant, the gist of the analysis in the confidential annex is that the likelihood of prejudice would have been negligible at the point at which the request was responded to.

54. The CPS's arguments when it initially refused the request referred to the possibility that disclosure would impede prosecutions and allow offenders to avoid justice. However, during the Commissioner's investigation, those arguments evolved into protecting the ability of the police and the CPS to discuss an exceptional national crisis.

55. In the Commissioner's view, those arguments stray into "safe space" territory. The purpose of the section 31 exemption is not to provide protection to officials who wish to discuss and debate policy. The purpose of the exemption is to ensure that public authorities are not required to disclose information which would prevent or impede the various law enforcement bodies from enforcing the law. The Commissioner has therefore given little consideration to "thinking space" arguments.

56. That being said, the Commissioner does recognise that, in order for the criminal justice system to work effectively, there needs to be a flow of information between police and prosecutors. That includes the creation of training materials with input from prosecutors. It is important that the police are not putting forward, for prosecution, cases which don't have a reasonable chance of resulting in a conviction (and that they are not dismissing cases based on an incorrect assumption that a successful prosecution is unlikely). That relies on the CPS feeding back issues being raised by the defence in the prosecutions that have moved forwards and explaining, to the police, the key points required for a successful prosecution to those who would need to gather evidence.

57. However, whilst some of the email chains do discuss some issues which have arisen, the Commissioner considers that most of the matters discussed were already in the public domain at the time the CPS responded the request. There is also very little which relates to any particular case or prosecution.

58. In the Commissioner's view, there is a clear line to be drawn between exchanging case-specific information or information relating to specific prosecution or defence tactics being used and the type of generic correspondence covered by the withheld information.

59. The withheld information reveals a small group of public officials working together diligently to apply extraordinary legislation, imposed in exceptional circumstances, consistently, fairly and in line with purpose the Regulations were aimed at achieving. They would (or, at least, should) have been aware that their correspondence would be covered by the FOIA and hence vulnerable to a FOIA request.

60. The Commissioner expects public servants to be robust and forthright in providing advice. They should not easily be swayed from doing so. The Commissioner does not consider it likely that the parties involved would be dissuaded from sharing this sort of information with each other – especially when they can be confident that more sensitive or case-specific correspondence and guidance would still be exempt. Equally, they should not be easily dissuaded from producing training materials – when there is a clear interest in doing so – just because the less-sensitive information might be vulnerable to a FOIA request.

61. Timing is key to this exemption. The Commissioner recognises that, particularly at the start of pandemic, decisions and projects that would normally take months had to be delivered within days. At the point of the request, there was considerable upheaval and people were scrambling around for answers. However, by the point the request was actually responded to, the legislation had matured somewhat and the national situation had calmed. The Commissioner therefore takes the view that the passage of time had reduced any prejudicial effects which might have occurred had disclosure of the information taken place at an earlier date.

62. The Commissioner is not ruling that this limb of the exemption will never be apply to material of this nature – only that this particular material, in these particular circumstances does not engage the exemption.

63. Had the withheld information covered particular prosecution or defence tactics or had the CPS issued its refusal notice whilst the Regulations were still in force, the Commissioner may have taken a different view. However, the CPS has not demonstrated that there is any real and significant risk to the administration of the criminal justice system which would result from disclosure of this information and the CPS certainly has not demonstrated that any prejudice is more likely than not to occur.

64. The Commissioner therefore considers that the CPS has not demonstrated that section 31 of the FOIA is engaged and is thus not entitled to rely upon the exemption.

C – Section 42 of the FOIA: Legal professional privilege

65. During the course of the Commissioner's investigation, the CPS informed the Commissioner that it now also wished to rely on section 42 because it considered that some of the information was covered by legal professional privilege (LPP).

66. 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.*

67. As the Commissioner's guidance on section 42 explains:

> *"The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings."*[1]

68. In *Bellamy v Information Commissioner* (EA/2005/0023), the First Tier Tribunal expanded on the types of material covered by LPP:

> *"In general, the notion of legal professional privilege can be described 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 imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation. A further distinction has grown up between legal advice privilege and litigation privilege. Again, in general terms, the former covers communications relating to the provision of legal advice, whereas the latter, as the term suggests, encompasses communications which might include exchanges between those parties, where the sole or dominant purpose of the communications is that they relate to any litigation which might be in contemplation, quite apart from where it is already in existence."*

[1] https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

69. The information to which the CPS wishes to apply section 42 is the two versions of the document from the private law firm and several of the email chains. This is the information that the Commissioner has considered.

70. In respect of the two documents from the private law firm, the Commissioner accepts that the firm qualifies as a professional legal advisor. The document contains a number of questions related to the implementation of the Regulations. Whilst it is not clear who requested the document, it is clear that the dominant purpose of the document is to provide a professional assessment of what the legislation says and what it means. On one version of the document, there are also comments from the CPS which, again, appear designed to provide a professional assessment of the legislation. The Commissioner therefore accepts that these two documents are covered by legal advice privilege.

71. There are also two further email chains which begin with a view, provided by a senior lawyer at the CPS, about a particular situation in relation to enforcement and what action the Regulations did (and didn't) allow the police to take. The Commissioner considers that this particular email, which was provided to several police forces, will also attract legal advice privilege because it constitutes advice given by a professional legal advisor (the CPS) to its clients (various police forces). Whilst the two email chains take different directions from the original email, the later emails in each chain refer back to the original legal advice in such a way that they would be rendered meaningless if all privileged information was removed. The Commissioner is therefore satisfied that these emails are privileged as well.

72. However, the CPS also claimed LPP in relation to a further six email chains. These chains cover discussions between police forces, the College of Policing, the Home Office, the National Police Chiefs Council and Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services. The Commissioner does not accept that these chains are covered by LPP.

73. The concept of LPP rests on a defined relationship between a legal advisor and their client. Given the large number of parties involved in the email trails, the Commissioner therefore asked the CPS to clarify who the legal advisor providing the advice was and who the client receiving or seeking the advice was. The CPS responded to say that:

> *"the CPS considers the client to be the police service. For example, there is email correspondence between [redacted] of the CPS and [redacted] from HQ Directorate of Legal Services at the Metropolitan Police and [redacted] of Humberside police."*

74. When asked who the legal advisor was, the CPS responded to say that:

> *"The generic term 'lawyer' means a legal adviser acting in a professional capacity and includes legal executives. With regard to the withheld information in this matter, most of the advice was provided by the legal advisor who was [redacted]. At the time [redacted] was fulfilling the position of Deputy Chief Crown Prosecutor within the Head of Legal Services team at the CPS."*

75. When asked to relate the exemption specifically to the information that had been withheld, the CPS added that:

> *"Pages 31 to 32 refer to material that is considered 'reasonable excuse' additional guidance. This was sent to [redacted] of the CPS by [redacted] of the Metropolitan Police.*
>
> *"Pages 33 to 34 refer to material sent to the CPS by [redacted] of Hampshire Police and NPCC Lead on Charging and Out of Court Disposals. There is very little material here that relates to what does and doesn't constitute a reasonable excuse under regulation 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. However, there is reference to Regulation 6 on page 33. On page 35 there is an email sent by the National College of Policing seeking feedback from the CPS. Any material here that may be considered in scope of the request would therefore be exempt under S42 of the FOI Act."*

76. Having reviewed these particular email chains, whilst the Commissioner accepts that these emails were sent to the CPS, she does not accept that the content of the information constitutes requests made for legal advice. Pages 31-32 and 33-34 make clear that the information being provided to the CPS had been provided for the purpose of keeping the CPS up to date with developments. Although the CPS would presumably have responded, had it considered it necessary, the fact that no such responses appear within the withheld information undermines the claim that the correspondence was privileged. Even if the Commissioner was to accept that the email sent to the CPS was privileged, it does not follow that the earlier emails in the chain were privileged.

77. With the exception of the two email chains described at paragraph 71 – and two emails which, although they sit within larger chains, do refer to specific advice from either the CPS or an independent Counsel – the overall picture of the information the CPS has claimed LPP for is one of numerous organisations developing policy and guidance in a collaborative fashion. It does not reflect specific legal advice being sought from a qualified legal advisor, nor the legal advisor providing their interpretation of the law.

78. The Commissioner considers that the concept of LPP does not extend so far as to cover communications of that type. The mere fact that a piece of correspondence has been sent by or to a professionally qualified lawyer does not render the correspondence as privileged. In many of the trails the CPS was only one of many organisations which were copied into the correspondence and therefore the Commissioner cannot accept that these chains reflect a client-advisor relationship.

79. Therefore, with the exception of the correspondence already identified, the Commissioner does not consider that the information attracts LPP and therefore section 42 is not engaged.

Public interest test

80. Section 42 is a qualified exemption and therefore, even where it is engaged, the public authority must still demonstrate that the balance of public interest lies in favour of maintaining the exemption.

81. As referred to above, LPP is a fundamental concept in ensuring fairness within the legal system and informing the quality of decision-making. It thus follows that, whilst the public interest in disclosure need not be truly exceptional, it must be considerable to outweigh the inherent damage that might be caused to the principle of LPP.

82. In the circumstances of this case, the Commissioner recognises that the Regulations were (at least at the time) a truly exceptional piece of legislation, given the sweeping powers they handed to the police and the dramatic curbs they imposed upon the civil liberties of people living in England. There is thus a strong public interest in understanding what advice the CPS was providing to police forces to help ensure that the law is enforced correctly.

83. That being said, the fact remains that this information is covered by LPP and there is thus also a strong interest in protecting that privilege. Public authorities should be able to seek and receive good quality legal advice without the fear that that advice might be disclosed to the world at large – potentially undermining a public position.

84. In *Bellamy v Information Commissioner* EA/2005/0023, the Tribunal set out the correct approach to the public interest balancing exercise in cases where section 42 is engaged:

> *"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest. It may well be that in certain cases, of which this might have been one were the matter not still live, for example where the legal advice was stale, issues might arise as to whether or not the public*

interest favouring disclosure should be given particular weight…Nonetheless, 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, of which this case is not one."

85. Building on the *Bellamy* decision, the High Court issued further, legally binding, guidance in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164 (QB). When dealing with section 42 cases, the Court ruled that:

"A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back-door" to an absolute exemption…it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

86. The Court also pointed, with approval, to a further decision of the Tribunal which noted that:

"What is quite plain, from the series of decisions beginning with Bellamy … is that ***some clear, compelling and specific justification for disclosure must be shown****, so as to outweigh the obvious interest in protecting communications between lawyers and client, which the client supposes to be confidential".* [emphasis added]

87. The Commissioner acknowledges that, in this particular case, the public interest in disclosure is amplified by the unique and draconian nature of the Regulations themselves. It is not for the Commissioner to pass comment on the appropriateness of the Regulations as a response to the pandemic – but as a general principle, the more restrictive a piece of legislation, the greater the public interest in understanding why that legislation was introduced and how it is being applied.

88. However, in the circumstances of this case, the Commissioner is not persuaded that these arguments meet the threshold, that the caselaw has established, whereby they outweigh the inherent and strong public interest in protecting LPP. Whilst the Commissioner acknowledges that

the legislation had been revoked at the point of the request, she considers that there was still a possibility, at that time, that similar legislation might be introduced in future – to which the privileged advice might also be relevant. Subsequent events have demonstrated that this possibility was more than hypothetical. She therefore cannot consider that the privileged material was in anyway "stale" at the point the request was responded to.

89. Having considered the content of the withheld information, the Commissioner does not consider that the information which attracts LPP would add significantly to the public's understanding of the issues – particular given the information already in the public domain. She therefore considers that, in the circumstances, the balance of the public interest favours maintaining the exemption.

90. The Commissioner therefore considers that the CPS is entitled to rely on section 42 to withhold the information specified in the confidential annex.

D – Procedural Matters

91. Section 10 of the FOIA requires a public authority to comply with its section 1 obligations *"promptly and in any event not later than the twentieth working day following the date of receipt."*

92. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it 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.*

93. Section 17(3) of the FOIA allows a public authority to extend the time for complying with the request or issuing a refusal notice if it needs additional time to consider the balance of the public interest.

94. There is no time limit beyond which the deadline cannot be extended, but the Commissioner's guidance states that a response should normally be provided within 40 working days. Any extension beyond that would only take place in the most exceptional of circumstances.

95. The CPS did not issue its refusal notice within 40 working days of the request. However, given that the refusal notice eventually issued by the CPS did not mention section 42 of the FOIA – an exemption on which it later came to rely – the CPS breached section 17 of the FOIA. The Commissioner does not therefore need to consider whether the CPS completed its public interest test within a reasonable period of time.

96. As the CPS did not identify all relevant information and did not disclose information to which exemptions did not apply within 20 working days, it also breached section 10 of the FOIA.

Right of appeal

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

98. 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.

99. 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 .....

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