

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2024

Public Authority: Ordnance Survey
Address: Adanac Drive
Southampton
SO16 0AS

Decision (including any steps ordered)

1. The Commissioner's decision is that the advice note prepared by legal advisors that the complainant has requested is exempt from disclosure under section 42(1) of FOIA as it attracts legal professional privilege.
2. It's not necessary for Ordnance Survey to take any corrective steps.

Request and response

3. The complainant made the following information request to Ordnance Survey (OS) on 21 August 2023:

"On 15 May this year [redacted] wrote to me, referencing (as he had done previously) a report he had commissioned from "independent legal advisors" as a result of a series of potential legal issues surrounding the relationship between OS Ltd and OS Leisure Ltd, and OS Leisure's market activities, issues which had been raised in writing by myself. I'd like to be supplied with a copy of this report please..."
4. OS' final position was that the requested information was exempt from disclosure under section 42(1) of FOIA.

Reasons for decision

5. This reasoning covers OS' application of section 42(1) of FOIA to the complainant's request. Under 'Other matters' the Commissioner will discuss matters the complainant raised in their complaint to him about OS' internal review.
6. Under section 42(1) of FOIA, information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
7. The purpose of legal professional privilege (LPP) is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their advisor so that the weaknesses and strengths of their position can be properly assessed. Therefore, LPP evolved to make sure communications between a lawyer and their client remain confidential.
8. There are two types of LPP – advice privilege and litigation privilege. OS has confirmed to the Commissioner that it considers that the withheld information is subject to advice privilege.
9. In its submission to the Commissioner OS has provided a detailed background and context to the request. OS had discussed its status - as a limited company wholly owned by Government and as a public corporation subject to managing public money as an "arms-length body" – and its three constitutional agreements.
10. OS says that it has, for many years, operated a standard data licensing model. Under this model it licenses OS' mapping data to a variety of customers for different purposes. These include to (i) direct customers for their internal business use, and (ii) Licensed Partners for incorporating the mapping data into their products and services for onward distribution to their own end users. This licensing model, constructed in order to ensure compliance with the Public Sector Information Regulations and competition law, therefore fulfils a part of the Public Task which is one of OS' constitutional agreements.
11. Licensed Partners return royalties to OS in arrears for using mapping data in products/services they sell.
12. The complainant is associated with one of OS' Licensed Partners. OS says that they have raised a number of complaints over the last nine years, on a number of diverse issues. All levels of OS senior management have been involved at various points in correspondence and face to face meetings. In addition, there have been complaints to

external regulators and others: the (now defunct) Office of Public Sector Information, the Competition and Markets Authority, the complainant's Member of Parliament, as well as the Partner Advisory Council that OS has established to provide a forum for engaging with Licensed Partners.

13. OS has gone on to discuss in more detail its interactions with the complainant over the years. The Commissioner has noted this but doesn't consider that this is relevant to the current case.
14. OS has provided the Commissioner with a copy of the information it's withholding. This information is clearly as it described to the complainant in its response to the request; namely the information represents legal advice provided to OS by its instructed lawyers; was made between professional legal advisor and client for the dominant purpose of obtaining advice; and was communicated in a legal advisor's professional capacity. OS has also confirmed to the Commissioner that the report attracts LPP and is confidential, and that this LPP hasn't been lost.
15. The Commissioner is satisfied that OS has correctly applied section 42(1) of FOIA to the requested information. He's gone on to consider the associated public interest test.

Public interest test

16. In their complaint to the Commissioner the complainant has noted that the requested information only exists as it was produced in response to a complaint they had made to OS. They say the report examines issues related to the operation of a market and therefore affects all the companies operating in that market. It was commissioned at taxpayers' expense and concerns the interests of businesses owned by taxpayers.
17. The complainant considers that this is an important case for a number of small businesses operating in a market that OS controls. They believe that the structure and operation of the market may breach competition law or state aid rules, or both.
18. In its correspondence to the complainant, OS had acknowledged that there's a public interest in transparency regarding OS and its status, structure and how it operates, as OS is a publicly owned organisation.
19. However, OS said, there's also a significant inherent public interest in maintaining LPP to protect the confidentiality of communications between client and lawyer, to safeguard candidness in all communications and to ensure full and frank legal advice.

20. OS noted that LPP is a long standing, fundamental principle of English Law, which exists to ensure that a legal person, which includes a public authority such as OS, may obtain legal advice in confidence.
21. In its submission to the Commissioner, OS also confirmed that the requested information – the legal advice note - is recent and, importantly, all points covered in the note remain live; the issues relate, amongst other things, to OS's organisational structure, operating model, and regulatory framework, all of which are unchanged since the time of the original request. OS noted that the complainant's challenges concerning these issues go back several years and are likely to persist beyond the outcome of this investigation.
22. OS says it's not aware of any strong countervailing considerations that would outweigh the inherent public interest in maintaining LPP. In their request for an internal review the complainant asserted that "there is no external regulation mechanism nor any other mechanism compelling OS to be open and transparent regarding its actions or policies". They appeared to cite this as a factor weighing in favour of the public interest in disclosing the information. However, as OS has explained to the complainant in the correspondence dated 15 May 2023, OS is in fact subject to a number of regulatory regimes and oversight mechanisms.
23. The Commissioner agrees with OS that the balance of the public interest favours withholding the requested information. LPP carries with it a very strong inherent protection due to the nature of the information that it covers, and the function that it plays in administering justice. The Commissioner has noted the complainant's arguments and concerns but doesn't consider these are sufficiently strong to overturn the protection that LPP requires. He's also taken account of the fact that the matters the information concerns remain 'live'.
24. The Commissioner's decision is therefore that OS is entitled to apply section 42(1) of FOIA to the requested information and the public interest favours maintaining this exemption.

Other matters

25. In their complaint to the Commissioner, the complainant first noted that the individual who carried out the internal review in this case holds three positions in OS, one of which they considered to involve a conflict of interest. The complainant didn't provide any more detail than this on that point.

26. Second, the complainant noted that the review was sent at 10:24 on a Saturday evening, "co-incidentally (or not) just a few minutes after the end of a major televised Rugby World Cup match." They therefore believed there were grounds that the review wasn't conducted with "due diligence and attention to detail, as the work was clearly carried out at the review officer's home on a Saturday evening. Those of a suspicious mind could speculate that it was in fact carried out while watching the rugby, with a glass of wine in hand. That is not how we expect a public body to consider an FOI application with critical implications for our small business."
27. The complainant has cast doubt on the professionalism of the reviewer and described a scenario that they consider might have taken place. The Commissioner has seen no evidence of a conflict of interest or of any absence of diligence in the review decision that was made, which, in the circumstances of this case, was a comparatively straightforward decision to make. The Commissioner also advises that an internal review should be provided within 20 working days of the request for a review and OS met that timescale. All in all, the Commissioner considers that OS' handling of the internal review was entirely satisfactory.

Right of appeal

28. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF