Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 June 2010

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant requested information from the Cabinet Office about progress with a suggested new facility for the Government's e-petitions website. Initially, the Cabinet Office stated no information relevant to the request was held. Subsequently, the public authority reviewed its position and stated information was held, made up of a request for legal advice, an outline accompanying the request and the resulting legal advice. The Cabinet Office provided the outline but withheld the request for legal advice and the advice as exempt information under section 42 of the Act. The Commissioner has investigated and found the request for legal advice and the advice were the only information held relevant to the information request that had not been disclosed. Furthermore the Commissioner is satisfied, having reviewed the balance of the public interest, that the requested information would be exempt by virtue of section 42(1) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 7 January 2008, the complainant requested the following information from the Cabinet Office:

extracts of the minutes of any meetings or any emails or other correspondence relating to the issue of petition creators being able to contact petition signers in some way.

It would appear the Cabinet Office received this request on the same date.

3. The Cabinet Office responded on 4th February 2008 and stated it did not hold information relevant to the request.

4. The complainant queried this reply on 4 March 2008 and the Cabinet Office confirmed again on 3 April 2008 that it did not hold information relevant to the request and further confirmed that no other public authority held such information, either on its own account or on behalf of the Cabinet Office. At the complainant's request, this decision was subject to an internal review, the results of which were communicated to him in a letter dated 2nd June 2008 from the Permanent Secretary responsible for Government Communications at the Cabinet Office.

5. The Permanent Secretary's letter stated that:

….the mechanism for persons signing petitions to receive up to two messages from the creator of that petition is not one on which work has yet been taken forward and consequently no information exists subsequent to the decision to take forward that issue.

6. The letter stated the e-petition team had sought legal advice on the implications of incorporating such a change in the future and this request for legal advice had included an outline of how the mechanism might work. The Permanent Secretary felt the outline fell within the terms of the complainant's information request and had considered whether it should be released. In his view the information was subject to legal professional privilege and therefore engaged the exemption in section 42(1) of the Act. However, having considered the full facts of the case and weighed the public interest, including the general interest in transparency, the Permanent Secretary had concluded the outline should be disclosed. He made clear this disclosure did not waive privilege in the other information (taken to mean the request for legal advice and the advice produced in response to the request, although this was not stated explicitly in the letter).

The Investigation

Scope of the case

7. On 1 August 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- In late 2006 he had suggested to the Cabinet Office website that a provision should be introduced similar to one on the Scottish Parliament website that allowed those signing e-petitions to agree their email addresses could be made available to the petition's creator.

- He received an acknowledgment stating his suggestion had been added to a list of features that would be discussed with a view to deciding whether they should be included in future.

- He thought his suggestion had been taken forward but when he contacted the Cabinet Office web team in 2007 he was told the facility was not yet available.

- He made his information request to see why the facility had not been implemented and received the responses described in paragraphs 3 to 6 above.

- He was not satisfied with these responses, particularly because the wording from the Permanent Secretary's letter quoted at paragraph 5 above suggested there was information prior to the decision to take forward his suggestion, information that would be covered by his request but which had not been disclosed.

- Considering the Cabinet Office's statement that legal advice had been requested concerning the proposed facility, the complainant thought it was extremely unlikely that a request for legal advice would have been made without prior discussion of the proposed facility. Such discussions would have come within the scope of his request for information but the Cabinet Office maintained no other information existed.

Chronology

8. The Information Commissioner wrote to the Cabinet Office on 9 June 2009 and set out the complainant's points as outlined in the previous paragraph. The Cabinet Office was asked to comment specifically on the apparent inconsistency in the wording from the Permanent Secretary's letter quoted at paragraph 5 above, which suggested there was information prior to the decision to take forward the complainant's suggested new facility, information that would be covered by his request but which had not been disclosed.

9. The Cabinet Office replied on 23 July 2009 and repeated the only information it held within the scope of the request was the request for legal advice, the accompanying outline (which had already been disclosed to the complainant) and the resulting legal advice. The Cabinet Office stated categorically that with the exception of these pieces of information and irrespective of the wording from the Permanent Secretary's letter it did not hold any other information falling within the scope of the request.

10. The Information Commissioner wrote to the Cabinet Office again on 29 July 2009 to double check this point because it appeared from further investigation that the development work on the Cabinet Office's e-petitions website was carried out external to government by a non-profit organisation called *mySociety*. This provided a possible explanation why the request for legal advice sprang fully formed without any apparent prior discussion. The Cabinet Office was also asked to reconsider its decision to withhold the request for legal advice and the resulting advice in view of its previous decision to release the outline that had accompanied the request for legal advice.

11. The Cabinet Office replied on 22 September and confirmed again that the only relevant information it held that had not been disclosed was the request for legal advice and the resulting advice. It had reviewed its decision to withhold this information and had concluded again that there was no clear compelling justification for disclosure that outweighed the in-built public interest in withholding information in respect of which a claim to legal professional privilege could be made under section 42(1) of the Act.

12. The Information Commissioner wrote to complainant on 25 September 2009 setting out the results of his investigation. The Commissioner stated the apparent inconsistency in the Permanent Secretary's letter quoted at paragraph 5 above was explained by the fact that development work on the Cabinet Office e-petitions website was carried out external to government by *mySociety*. The Commissioner

was satisfied that the only information within scope of the request that was held by the public authority was the request for legal advice, the accompanying outline and the resulting advice. The Commissioner explained the exemption for legal professional privilege in section 42 of the Act was not set aside lightly and following his investigation was minded to conclude that no grounds existed in the present case to justify disclosure. On 23 October the complainant advised the Commissioner that he wished his complaint to proceed.

13. Following a review of the investigation of this complaint, the Commissioner wrote again to the Cabinet Office on 13 January 2010 to test further whether, in accordance with section 3(2)(b) of the Act, there was information that fell within scope of the request that was held on behalf of the Cabinet Office by another person, in this case *mySociety*. The Cabinet Office was asked to provide the contract under which *mySociety* runs and develops the e-petitions website on behalf of the Cabinet Office. The Cabinet Office was also asked to explain who owns the information, including personal data, submitted to the e-petitions website and whether the Cabinet Office could obtain copies of such information from *mySociety*. The Cabinet Office was asked to explain what records the contract required *mySociety* to keep and for clarification of what information was deemed to be held by *mySociety* on behalf of Cabinet Office and what was held by *mySociety* in its own right. The Cabinet Office was also asked to confirm the process when a suggestion for an improvement to the e-petitions website was made. Finally, the Cabinet Office was asked to confirm whether *mySociety* held any information within scope of the request that had not been disclosed to the Information Commissioner during his investigation.

14. The Cabinet Office responded on 24 February 2010. Its position was no information was held on its behalf by *mySociety.* In response to the request for the contract, on 3 March 2010, the Cabinet Office provided a copy of the *Petitions System Agreement between mySociety and Number 10 Downing Street*. Cabinet Office noted in its covering letter this was not *"a normal business deliverables contract".* The Cabinet Office noted nothing in the agreement gave it authority to demand copies of information from *mySociety* and nor did it require *mySociety* to hold particular types of records. The Cabinet Office stated information held on the e-petitions website, including personal data, was held by *mySociety* and it was for this reason that *mySociety* was registered with the Information Commissioner as the data controller for the site. Separation of ownership had been agreed to remove any suggestion that Government could access data and use it for its own purposes.

15. The Commissioner wrote to the Cabinet Office again on 5 March pointing out the *Petitions System Agreement* was drafted to ensure *mySociety's* independence was not compromised by its association with the Government's e-petitions website. As noted, it was not "normal business deliverables contract" and it appeared the Agreement was designed to sit alongside such a contract. The Cabinet Office was asked to confirm whether there was such a contract, if yes to provide a copy and if no to explain how the business arrangement between the Cabinet Office and *mySociety* was regulated (e.g. with regard to payment for *mySociety's* services). Cabinet Office was also asked again about the process for handling suggested improvements to the e-petitions website as these questions had not been addressed in its previous reply. Finally, while noting the Cabinet Office's response about *mySociety* being registered as the data controller of the site, the Commissioner also asked again who owned information submitted to the site? The Commissioner noted the apparent conflict in information published on the site on this point and asked for an explanation.

16. The Cabinet Office replied on 22 March 2010 and stated it was unable to answer all of the questions the Commissioner had asked. In fact the only substantive answer given by the Cabinet Office was confirmation that there was no separate contract between *mySociety* and Cabinet Office, the relationship being governed solely by the Agreement already provided.

17. The Commissioner wrote again on 21 April and asked for a third time for an explanation of the process followed when suggestions were received about changes or improvements to the e-petitions. The Commissioner also asked about the enquiries the Cabinet Office had made of *mySociety* in order to respond to the Commissioner's questions about this request.

18. The Cabinet Office responded on 6 May 2010 and stated suggestions to improve the e-petitions website might be received by either Cabinet Office or *mySociety* but in the latter instance would always be copied to the Cabinet Office. *mySociety* had no autonomy to accept or reject suggestions without reference to the Cabinet Office. In addition, the Cabinet Office provided copies of the enquiries it had made to *mySociety* and their responses. This included two strings of email messages provided by *mySociety* dating from 2007, which the Cabinet Office had held previously but did not hold anymore because they had been deleted in line with the Cabinet Office's record management policy. Cabinet Office advised under this policy emails are only retained for three months unless required as part of the departmental record or while there is still a business need to retain them.

19. The first string of email message was made up of an exchange with the present complainant that culminated in the information request dated 7 January 2008, which is the subject of this Notice. These emails have not been considered any further as part of the Commissioner's investigation because the complainant already held copies at the time of his information request.

20. The second string of email messages was dated March 2007 and was made up of an exchange between another member of the public, not the present complainant, and *mySociety* querying whether petition creators could access the email addresses of those signing their petitions. *mySociety* copied this exchange to the Cabinet Office so that it was aware of the issues raised.

21. In its reply of 6 May 2010, the Cabinet Office invited the Commissioner to contact *mySociety* direct if he had further enquiries. The Commissioner contacted *mySociety* on 21 May 2010 to check whether it held any information within scope of the request. In particular, one comment in the March 2007 exchanges between the Cabinet Office and *mySociety* copied to the Commissioner suggested either a decision had been made or there was a discussion in 2007 about the suggested change to the e-petitions website that would have allowed petition creators to contact signatories, the suggestion that had prompted the present information request.

22. *mySociety* responded on 28 May 2010 and confirmed it had provided the Cabinet Office with all of the information it held relevant to the request and it seemed clear the Cabinet Office had in turn passed copies to the Commissioner. *mySociety* did not hold any other information that might have suggested either a decision had been made or recording a formal discussion in 2007 about the suggested improvement to the e-petitions website.

23. Having received *mySociety's* reply the Commissioner considered the second string of email messages described at paragraph 20 above. The Commissioner noted that this string of messages would have come within scope of the information request. However the Commissioner noted in addition that the Cabinet Office would not have held this string of emails at the date of the information request because in line with the records management policy outlined at paragraph 18 the exchange would have been deleted. In addition, the Commissioner considered whether *mySociety* held this email string on behalf of the Cabinet Office at the date of the information request but has concluded it was only held by *mySociety* in its own right. This conclusion has been reached in the light of findings set out in paragraphs 13 to 15 above, which, in the absence of any evidence to the contrary, indicate there is

nothing in the relationship or arrangements between the Cabinet Office and *mySociety* that requires the latter to keep any particular type of records or information on behalf of the former.

Analysis

24. At the end of his investigation, as described in the previous paragraph, the Commissioner was satisfied the information held by the public authority within the scope of the request comprised the request for legal advice, the accompanying outline (which had been disclosed to the complainant) and the resulting legal advice. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal (the 'Tribunal') in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The Commissioner will apply that standard of proof to this case.

25. He has also been assisted by the Tribunal's approach, in the same case, where it explained that the application of the 'balance of probabilities' test to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It will also require considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.

26. The Commissioner's test has recently been confirmed in the Tribunal decision of *Innes v Information Commissioner* (EA/2009/0046), published on 27 October 2009. The central issue of the appeal was whether the balance of probabilities was the correct test when reaching a finding as to whether information is held or not. The Tribunal stated at paragraph 41 that;

"*This Tribunal is not prepared to introduce any kind of sliding scale in terms of the standard of proof beyond the balance of probabilities. The House of Lords and other senior courts in recent decisions have confirmed the importance of maintaining the core principle -- in civil proceedings – that the correct test is the balance of probabilities. It is*

only in relation to Asylum and childcare and child safety issues that there is any kind of variation."

27. As paragraphs 8 to 11 above make clear, the Commissioner asked the Cabinet Office on two separate occasions during his investigation of this complaint to clarify the information it held within scope of the request for information. On both occasions the reply was unequivocal. The only information held was the request for legal advice, an outline that accompanied it (which has been disclosed to the complainant) and the resulting legal advice.

28. It was clear following examination of the request for legal advice that it originated from *mySociety*, a non-profit organisation external to government, which carries out the development work on the Cabinet Office's e-petitions website. This was supported by information provided to the Commissioner by the complainant, consisting of an email to him from *mySociety*, which thanked him for his suggestion about passing on information to the petition creator. As paragraphs 15 to 23 above make clear, the Commissioner has made extensive further enquiries both of the Cabinet Office and of *mySociety* but has been unable to uncover any further information within scope of the request

29. Taking these factors into account, the Commissioner is satisfied that no further information on the matter is held and that any apparent discrepancy alluded to by the complainant is a result of the involvement of *mySociety* in the administration of the e-petition development.

Section 42

30. Section 42(1) states information is exempt if it is information to which a claim to legal professional privilege could be made. The Cabinet Office explained why it felt the information requested was covered by the exemption in section 42(1) when reporting the results of its internal review to the complainant. It stated there is a strong public interest in a person seeking legal advice being able to communicate with his legal advisers in confidence and to receive such advice in confidence. When responding to the Commissioner's further enquiries the Cabinet Office supplemented this argument by reference to the High Court's decision in *Department for Business, Enterprise and Regulatory Reform v O'Brien* [2009] EWHC 164 in which it was held "that there is an in-built public interest in not disclosing information subject (in that case) to legal professional privilege."

31. Noting that he was aware that legal advice was not normally released, although on some occasions it was, the complainant did not really take

issue with the Cabinet Office's reliance on the exemption in section 42(1) of the Act. Rather, in his last message to the Commissioner, he described the issue of the legal advice as a "red herring" because his primary interest was in other information that he felt should be held and would be within the scope of his request (see the last bullet point at paragraph 7 above). Having examined the withheld information and established that it consists of instructions for a legal opinion and the legal advice itself the Commissioner is satisfied that the information is covered by legal professional privilege and that the exemption in section 42 of the Act is engaged and has been correctly applied by the Cabinet Office.

Public interest arguments in favour of disclosing the requested information

32. The Cabinet Office cited transparency as the reason for its decision to release the outline that accompanied the request for legal advice to the complainant when it reported the results of its internal review. Greater transparency could clearly be a factor in favour of disclosing the request for legal advice and the legal advice as well. Disclosure would provide a clearer view of one of the high profile mechanisms that Government uses to engage with the public. It could be argued that the specific disclosure of legal advice on issues and factors surrounding further development of such an engagement mechanism would deepen the public's understanding of the nature of the engagement and the constraints within which the engagement took place.

33. A further public interest factor in favour of disclosure appears in the text of the outline disclosed to the complainant. This states "(T)he fact that the PM has a right of reply of max two messages to the signers of the petitions produces a fairly self-explanatory argument that the creator of a petition should have the same right." This is less about transparency and rather more about arguments to do with natural justice. As the facility has not been introduced the imbalance between what the Government can do and what the petition creators can do is maintained. There would be a public interest in knowing the reasons why.

34. It could be argued that the issue covered by the legal advice is of limited, technical interest and therefore is not of sufficient weight to disturb the public interest inbuilt in the legal professional privilege exemption. Similar arguments could be advanced in the present case with regard to the absence of significant amounts of public money being involved, no suggestion that this technical matter is one of interest to large numbers of people and no suggestion that there is any suspicion of misrepresentation or improper behaviour. These are all

factors that have featured in previous determinations with regard to disclosing information exempt by reason of legal professional privilege but in the Commissioner's view none of them are relevant in the present case.

Public interest arguments in favour of maintaining the exemption

35. The Commissioner's position is that there will always be a strong element of public interest inbuilt into the legal professional privilege exemption. However it is not an absolute exemption and where there are equal or weightier countervailing factors, then the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. This position is based on various precedents, which have been referred to and summarised in the High Court's decision on *Department for Business, Enterprise and Regulatory Reform v O'Brien* [2009] EWHC 164, already quoted by the Cabinet Office.

36. Another factor weighs against disclosure. The proposed facility covered by the legal advice has not yet been introduced and in that respect it could be argued that the advice is still "live" or current. It is not known whether a final decision has been made to introduce the facility or not.

Balance of the public interest arguments

37. In the Commissioner's view, taking account of the public interest inbuilt in the legal professional privilege exemption, the balance favours maintaining the exemption. The public interest arguments set out at paragraphs 20 and 21 are not sufficiently compelling, either singly or collectively, to outweigh that inbuilt public interest.

The Decision

38. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

39. The Commissioner requires no steps to be taken.

Right of Appeal

40. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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

Dated the 21st day of June 2010

Signed ……

Lisa Adshead
Group Manager

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF

Legal Annex

1 General right of access to information held by public authorities

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny".

3 Public authorities

(1) In this Act "public authority" means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

(2) For the purposes of this Act, information is held by a public authority if—
(a) it is held by the authority, otherwise than on behalf of another person, or
(b) it is held by another person on behalf of the authority.

42 Legal professional privilege

(1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.