

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 March 2010

Public Authority: HM Treasury
Address: 1 Horseguards Road
London
SW1A 2HQ

Summary

The complainant requested a copy of a report prepared for Northern Rock by its external legal advisers into the conduct of the previous board of directors. The report focused on whether a claim could be brought against the former directors of the bank in respect of their management at the time that it needed a liquidity support facility from the Bank of England. HM Treasury held a copy of the report requested by the complainant because following the decision to take Northern Rock into public ownership it became the sole shareholder in the bank. HM Treasury refused to disclose the report on the basis that it was exempt from disclosure under section 42(1), legal professional privilege, and section 41(1), information provided in confidence. The Commissioner has concluded that the report is exempt from disclosure on the basis of section 42(1) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the report.

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.

Background

2. In September 2007 Northern Rock, a publically listed UK based bank, sought a liquidity support facility from the Bank of England. This was to ensure that Northern Rock could fund its operations during the period of turbulence in the financial markets.
3. On 22 February 2008 Northern Rock was taken into public ownership. The nationalisation was as a result of two unsuccessful bids to takeover the bank, neither being able to fully commit to the repayment of taxpayers' money.
4. At the time of the complainant's request, and indeed at the time which this Notice is being issued, the government is the sole shareholder in Northern Rock and therefore has access to information about its business affairs, including information of the nature requested in this case.

The Request

5. On 4 February 2009 the complainant submitted to HM Treasury an email containing the following request:

'a copy of the report by Freshfields Bruckhaus Deringer into the conduct of the previous board of Northern Rock'.
6. HM Treasury responded on 5 March 2009 and confirmed that it held a copy of the report falling within the scope of the complainant's request. However, it explained that it believed that the report was exempt from disclosure on the basis of section 42(1) and the public interest favoured maintaining the exemption.
7. On 16 March 2009 the complainant asked for an internal review of this decision.
8. HM Treasury informed the complainant of the outcome of the review on 7 July 2009. The review noted that the report identified as falling within the scope of the request focused on the possibility of bringing claims against former directors of Northern Rock and therefore did not exactly match the terms of the request as it did not cover the conduct of the former directors, rather the work that would be needed to establish a claim. However, HM Treasury was satisfied that the content of report meant that it was sufficiently close as to fall within the scope of the request. The review also concluded that the initial refusal was

correct to conclude that the report was exempt from disclosure on the basis of section 42(1) and furthermore it was also exempt from disclosure on the basis of section 41(1) because it was provided to HM Treasury by Northern Rock in confidence.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 7 July 2009 in order to complain about HM Treasury's decision to refuse to disclose the report. The complainant argued that the public interest favoured disclosing the information he requested. The complainant did not query HM Treasury's explanation of the information which fell within the scope of his request.

Chronology

10. The Commissioner contacted HM Treasury on 12 August 2009 and asked to be provided with a copy of the report along with submissions to support its application of the exemptions.
11. On 11 September 2009 HM Treasury provided the Commissioner with a copy of the report.
12. HM Treasury provided the Commissioner with detailed submissions to support its reliance on sections 42(1) and 41(1) on 15 October 2009.

Analysis

Exemptions

Section 42 – legal professional privilege

13. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
14. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending. For litigation privilege to apply there must be a reasonable prospect of litigation, i.e. a real likelihood, not just a fear or possibility.

15. The category of privilege which HM Treasury is relying on to withhold some information is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege.
16. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving legal advice. The determination of the dominant purpose is a question of fact which can usually be found by inspecting the documents themselves.
17. The Commissioner accepts that the report attracts legal advice privilege because the dominant purpose of the document is clearly the provision of legal advice by Freshfields Bruckhaus Deringer to Northern Rock on the *potential* for claims against former directors who were in post when the bank sought a liquidity support facility from the Bank of England. The Commissioner recognises that given the nature of the advice, the potential for claims, it could be argued that the advice in fact attracts litigation privilege. However, having considered the content of the advice and the fact that by the time of the complainant's request Northern Rock had confirmed that it would not be taking action against the former directors, the Commissioner is satisfied that there was not a real likelihood of Northern Rock taking a claim.

Public interest test

18. However section 42 is qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the report.

Public interest arguments in favour of disclosing the requested information

19. HM Treasury noted that there was a general public interest in disclosing information about the activities of the previous board and events which led up to the decision to take Northern Rock into temporary public ownership.
20. HM Treasury also noted that although Northern Rock announced in October 2008 that it would not be taking legal action against former

directors, there is a public interest in knowing more about the background about how that decision was reached. This was especially true given the large amount of public money used to support Northern Rock and the public interest in knowing whether some of this could be recouped leaving Northern Rock better able to repay its debt to the government.

21. In his complaint to the Commissioner the complainant emphasised that the level of the taxpayer funded bail-out that Northern Rock received, namely £28bn, meant that there was an overwhelming public interest in disclosing this information. Furthermore the complainant highlighted the fact that the former directors and chairman had earned millions of pounds prior to leading the bank into collapse yet none of them had faced investigation.

Public interest arguments in favour of maintaining the exemption

22. HM Treasury highlighted the significant inbuilt weight in upholding the exemption contained at section 42(1) because there was a very strong public interest in protecting the confidentiality of communications between lawyers and their clients in order to ensure that decisions are taken in a fully informed context. HM Treasury noted that this point had been accepted by a number of Information Tribunal decisions and also by the High Court, in particular in the case of *Department for Business Enterprise and Regulatory Reform v O'Brien and the Information Commissioner*. At paragraph 53 of his decision Williams J held that:

‘The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.’¹

23. HM Treasury also argued that there were a number of arguments specific to this case which supported maintaining the public interest:
24. During the period of temporary public ownership Northern Rock is managed by its board at arms length from the government on normal commercial principles. It is important that Northern Rock, like any

¹ *Department for Business Enterprise and Regulatory Reform v O'Brien* [2009] EWHC 164 (QB) (10 February 2009) <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

other commercial organisation, is able to obtain high quality legal advice in order to ensure the effective conduct of its business. This advice needs to be given in context and with the full appreciation of the relevant facts, a position which would be undermined if this report was disclosed.

25. There has already been litigation challenging the government's decision to take Northern Rock into temporary public ownership and therefore the possibility of future litigation against either the government or Northern Rock could not be ruled out.
26. Disclosure could potentially prejudice Northern Rock's ability to defend its legal interests, both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on future advice having been fully considered and presented without fear.
27. HM Treasury noted that the report did not comment on the behaviour of individual directors but instead focused on more general issues and therefore disclosure of the report would not add significantly to the public's understanding of how Northern Rock came to be in a position to need support from government.
28. Finally, HM Treasury argued that there was already a significant amount of information in the public domain about the reasons for Northern Rock's problems, including the report by the Treasury Select Committee, 'The Run on the Rock', which considered the responsibility of the board in relation Northern Rock's problems.²

Balance of the public interest arguments

29. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege interest in order to protect the confidentiality of communications between lawyers and their clients, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty that

² House of Commons, Treasury Committee '[The run on the Rock](#)', Fifth Report of Session 2007–08, Volume I

those in favour of maintaining the exemption'. (Tribunal at para. 41).

30. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:
 - how recent the advice is; and
 - whether it is still live.
31. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner has used the following criteria:
 - the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
32. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to still be used as part of a decision making process.
33. In many cases the age of the advice is closely linked to whether the advice is still live; advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
34. The advice in this case dates from May 2008 and therefore the Commissioner accepts that at the time when the complainant submitted his request for information in February 2009, the advice was still relatively recent.
35. Furthermore, the Commissioner accepts HM Treasury's suggestion that there remains a realistic prospect of litigation surrounding the government's decision to take the Northern Rock into temporary public

ownership, along with associated decisions such as the action, or lack thereof, taken against the previous board of Northern Rock. Therefore the Commissioner believes that it would accurate to describe the advice as live.

36. With regard to the public interest factors in favour of disclosure the Commissioner recognises that they are ones which are regularly relied upon in support of the public interest in favour of disclosure, i.e. they focus on the need for a public authority to be accountable for and transparent about decisions that it has taken. (Or in this case essentially decisions taken by Northern Rock on behalf of HM Treasury.) However, this does not diminish the importance of such arguments as they are central to the operation of the Act and thus are likely to be employed every time the public interest test is discussed.
37. In terms of how much weight these factors should be given the Commissioner agrees with the complainant that there is obviously a significant level of public interest in the government's ownership of Northern Rock given the number of people affected by the Northern Rock's difficulties and the subsequent decision to take it into public ownership. Such interest comes from the bank's customers, both savers and borrowers; those who owned shares in the bank when it was publically listed; and indeed all taxpayers in the UK given the amount of money the government invested into Northern Rock. Therefore in the Commissioner's opinion significant weight needs to be given to the argument that disclosure of information which would inform these parties about events leading up to Northern Rock's collapse and its subsequent management once in public ownership.
38. Similarly, given the amount of government money invested into Northern Rock the Commissioner agrees that this adds considerable weight to these arguments in favour of disclosure.
39. However, the Commissioner notes that the Tribunal, in *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* (EA/2007/0052), felt that a key reason why the disclosure of the requested legal advice was necessary in that case because of the crucial lack of transparency by the public authority in question. In this case the Commissioner does not feel that such a fundamental lack of transparency is apparent: Northern Rock announced, and explained in general terms, its decision not to take any action against the former directors in October 2008. Furthermore, the Select Committee report does include a detailed analysis of the role of the directors of Northern Rock in its downfall.
40. Furthermore, key to any balancing of the public interest is the degree to which the *content* of the requested legal advice would in fact

advance the public interests in favour of disclosure. The Commissioner notes that in dealing with this request HM Treasury made it clear that the focus of the advice was less on the conduct of previous Northern Rock directors, rather the work that would be needed to establish a claim against them. Therefore the degree to which the information would in fact inform the public about how Northern Rock came to need such a significant injection of taxpayer's money is very limited. Moreover, although the Commissioner cannot obviously describe the content of the advice in detail, he does not believe that it would greatly inform the public about the reasoning not to take action against the former directors.

41. In conclusion, when taking into account the strong inbuilt weight in favour of protecting legal professional privilege, the fact that this information is recent and live, and the fact that disclosure would not add substantially to the public's understanding of the government's involvement in Northern Rock, the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 41 – information provided in confidence

42. As the Commissioner has decided that the requested information is exempt from disclosure on the basis of section 42(1) he has not considered whether the information is also exempt from disclosure on the basis of section 41(1).

The Decision

43. The Commissioner's decision is that the HM Treasury was correct to conclude the requested report was exempt from disclosure on the basis of section 42(1) and in all the circumstances of the case the public interest in favour of maintaining the exemption outweighs the public interest in disclosure of the information.

Steps Required

44. The Commissioner requires no steps to be taken.

Other matters

45. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
46. The Commissioner has issued guidance on the time limits on carrying out internal reviews under the Act.³ This guidance explains that in the Commissioner's opinion 20 working days constitutes a reasonable amount of time to conduct an internal review. In exceptional circumstances it may be reasonable to take longer but in no circumstances should the total time taken exceed 40 working days. In this case, the complainant contacted HM Treasury on 5 March 2009 and asked it to conduct an internal review. HM Treasury did not inform the complainant of the outcome of this review until 7 July 2009.
47. In the future the Commissioner expects HM Treasury to ensure that when it undertakes internal reviews it does so in line with the guidance referenced in the preceding paragraph.

³ [Freedom of Information Good Practice Guidance No. 5](#)

Right of Appeal

48. 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 served.

Dated the 16th day of March 2010

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides 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.”

Section 1(2) provides that -

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

Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would

constitute a breach of confidence actionable by that or any other person.”

Legal Professional Privilege

Section 42(1) provides 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.”