Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **19 November 2018**

Public Authority: **Attorney General's Office**
Address: **5-8 The Sanctuary**
London
SW1P 3JS

Decision (including any steps ordered)

1. The complainant requested information relating to an allegation of contempt of court. The Attorney General's Office (AGO) confirmed it held relevant information, but refused to provide it, citing section 42 (legal professional privilege) of the FOIA.

2. The Commissioner's decision is that the AGO was entitled to rely on the exemption at section 42(1) of the FOIA to withhold the information. She requires no steps to be taken as a result of this decision.

Background

3. The AGO provides legal advice and support to the Attorney General and the Solicitor General (the Law Officers) who give legal advice to government.

4. The *gov.uk* website states[1]:

> *"The Attorney General and Solicitor General (the Law Officers) can be asked to look at some types of contempt of court.*

[1] https://www.gov.uk/guidance/types-of-contempt-of-court-dealt-with-by-the-attorney-generals-office

One legal definition of a contempt of court is: 'an act or omission calculated to interfere with the administration of justice'. …

The Attorney General can take legal action in the public interest if a contempt of court has been committed".

5. The request in this case relates to a possible contempt of court. The allegation of contempt arose in relation to an email sent, by a member of the public, to the presiding district judge during criminal proceedings.

Request and response

6. On 2 June 2018, the complainant wrote to the AGO and requested information in the following terms:

"[Name redacted] *was recently convicted at Westminster Magistrates' Court of an offence against the Communications Act 2003, section 127.*

I understand that in late June/ early July 2017, the judge disclosed to [name redacted]*'s legal team an email he had received from a member of the public, and that* [name redacted] *subsequently referred this email to you as a possible contempt of court.*

Please could you provide me with the following by return email:

1. A copy of the email to the judge

2. A copy of [name redacted]*'s complaint*

3. The status of the complaint

4. Any other recorded information you hold on the issue".

7. The AGO responded on 14 June 2018. It listed the information it held that fell within the scope of the request, but refused to provide it, citing the following exemption as its basis for doing so:

- section 42 legal professional privilege.

8. Following an internal review, the AGO wrote to the complainant on 12 July 2018. It revised its position with respect to the amount of information it held. However, it maintained that section 42 applied to that information.

Scope of the case

9. The complainant contacted the Commissioner on 13 July 2018 to complain about the way his request for information had been handled.

10. He told the Commissioner:

> *"I would like to appeal the refusal notice in its entirety.*
>
> *In particular, I note that the public interest cannot possibly be said to favour the withholding of the email itself, which was read out in open court. Things read in open court are considered to be in the public domain: see eg R (Guardian News and Media) v City of Westminster Magistrates Court and Aria Technology v HMRC and Situation Publishing [2018] UKUT 111 (TCC)".*

11. The withheld information in this case was initially described by the AGO, in its correspondence with the complainant, as:

> *"a. The application from* [name redacted]*.*
>
> *b. A copy of the email sent by* [sender's name redacted] *(redacted).*
>
> *c. Enclosures provided by* [name redacted]*.*
>
> *d. A list of charges.*
>
> *e. Summary of the hearing provided by prosecution counsel.*
>
> *f. An unredacted copy of the email sent by* [sender's name redacted]*.*
>
> *g. A draft copy of the letter sent to* [name redacted] *prepared by the Solicitor General's legal adviser.*
>
> *h. Emails from the Crown Prosecution Service.*
>
> *i. Emails summarising the legal adviser's advice to the Solicitor General.*
>
> *j. The submission prepared for the Solicitor General".*

12. The Commissioner notes that the AGO subsequently told the complainant that it did not hold the document listed at bullet point 'f' – an unredacted copy of the email sent to the District Judge. The AGO apologised that it was listed in error in the initial response.

13. The complainant did not dispute the amount, or nature of, the withheld information.

14. During the course of the Commissioner's investigation, the AGO wrote to the complainant with reference to point 3 of his request. It explained, outside of the FOIA, the outcome of the complaint.

15. The AGO provided the Commissioner with a copy of the withheld information during the course of her investigation. The analysis below considers the AGO's application of section 42 of the FOIA to that information.

Reasons for decision

Section 42 legal professional privilege

16. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.

17. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023) (Bellamy)[2] 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."*

18. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

[2] http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

19. In this case, the AGO considered that all the withheld information falls within section 42(1) because it is subject to litigation privilege.

20. The complainant disputed the withholding of the requested information. He told the AGO:

> *"Since the email was referred to (and I believe read out) in open court, it seems unlikely that its actual text can be subject to LPP and that the public interest would be harmed by disclosing it again? Similar concerns may well apply to some of the other information to which you have referred".*

21. Having viewed the withheld information, the Commissioner is satisfied that it constitutes communications between a lawyer and their client and that it clearly relates to legal matters.

22. Furthermore, having considered the complainant's and the AGO's submissions and consulted her guidance, the Commissioner is satisfied that the withheld information falls within the definition of LPP. She has reached that conclusion on the basis that she is satisfied that the information was obtained / provided / created for the purpose of proposed litigation i.e. a prosecution.

23. Having established that the requested information falls within the definition of LPP, the next matter for the Commissioner to consider is whether privilege has been lost or waived because of earlier disclosures.

24. The Commissioner's published guidance on section 42 of the FOIA[3] states:

> *"…under FOIA we are concerned with disclosures to the world at large rather than disclosures to a limited audience. In a freedom of information context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential".*

25. Her guidance also states:

> *"A disclosure of information made in open court is an unrestricted disclosure. That information has lost its quality of confidence and will no longer be protected by privilege. Where there is any doubt*

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

as to whether information was or was not disclosed in open court, the Information Commissioner will only consider documents to have lost confidentiality when a judge has allowed disclosure on an unrestricted basis. However it is only the information actually disclosed in open court that will lose its LPP protection for freedom of information purposes; so any residual information (that has only been disclosed to the court and the opponent) will still be protected".

26. The Commissioner is mindful that while the complainant told the AGO that the email requested at part (1) of the request was **referred to,** and **he believed,** read out in open court, he told the Commissioner that it **was** read out in court.

27. During the course of her investigation, the Commissioner wrote to the AGO on that point, asking it to confirm whether or not the information was read out in open court.

28. While the AGO acknowledged that the email in question was referred to in open court, it was unable to confirm whether or not it was actually read out in open court.

29. The AGO also stated that it was unaware of any other means by which the contents of the email would have come into the public domain.

30. The Commissioner conducted her own research of the internet to establish if there was any information in the public domain evidencing that privilege attached to the withheld information had been lost.

31. In the absence of unequivocal supporting evidence that the email sent to the presiding judge was read out in open court, or that a judge has allowed disclosure on an unrestricted basis, the Commissioner cannot be satisfied that any of the withheld information can be considered as a public document and therefore that it has lost its LPP protection for freedom of information purposes.

32. She therefore finds that section 42 is engaged in respect of the withheld information.

The public interest test

33. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

34. The complainant's public interest arguments centred on his belief that information within the scope of the request had been read out in a public courtroom.

35. The AGO recognised that there is a public interest in disclosure as it encourages and ensures greater transparency and accountability in the conduct of the Office's affairs.

36. In correspondence with the Commissioner it acknowledged that it may be in the public interest to disclose material that informs Law Officers' decisions about instituting proceedings:

> *"… because it is in the public interest to see that accurate decisions are made and proceedings are brought fairly".*

Public interest arguments in favour of maintaining the exemption

37. Arguing in favour of maintaining the exemption, the AGO told the complainant:

> *"… there is a strong inherent public interest in maintaining legal professional privilege as it ensures that the Law Officers are able to receive free and frank advice from their legal advisers when considering whether to institute proceedings for contempt of court. They need to be able to discuss and debate cases freely with their legal advisors and need to be provided with enough information to make full and informed decisions".*

38. It argued that this is fundamental to the administration of justice.

39. Describing the withheld information as material *"of limited public interest*", the AGO told the complainant that it did not consider that this was a case in which there is a clear cut public interest in disclosure.

Balance of the public interest arguments

40. In *Bellamy* the principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the information sought. Explaining the balance of factors to consider when assessing the public interest test, it said:

> *"… there is 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".*

41. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built

public interest in this exemption: that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.

42. Although she considers there will always be an initial weighting towards maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.

43. In accordance with her guidance on section 42, the Commissioner considers the factors in favour of disclosure include the assumption in favour of disclosure and the rationale behind the assumption (ie accountability, transparency, furthering public debate etc).

44. She recognises that additional weight may be added to the above factors in favour of disclosure if the following issues are relevant in the particular case:

- large amount of money involved;
- whether or not a significant group of people are affected by the advice or resulting decision;
- lack of transparency in the public authority's actions;
- misrepresentation of advice that was given;
- selective disclosure of only part of advice that was given.

45. The Commissioner recognises that it is also important to take into account the significance of the actual information and what it reveals.

Conclusion

46. In reaching a conclusion in this case, the Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.

47. In reaching her decision in this case, the Commissioner has considered the arguments put forward by the complainant and the stated position of the AGO in addition to the prior findings of the Commissioner and the

Information Tribunal in relation to legal professional privilege. She has also had regard for the content of the withheld information.

48. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. She gives weight to those arguments.

49. However, the Commissioner has also taken into account that, at the time of the request, the legal advice was relatively recent and was live in that it was still being relied on.

50. Furthermore, in order to outweigh the inherent public interest in maintaining the exemption, the Commissioner considers that there must be a compelling argument for disclosure. In this case the Commissioner has not been presented with any such arguments.

51. In all the circumstances of this case, the Commissioner does not consider that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.

52. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of the FOIA for litigation privilege has been correctly applied.

Right of appeal

53. 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@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.

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

Signed .....

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