

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 19 October 2006

Public Authority: City of London Police
Address: Headquarters, 37 Wood Street, London, EC2P 2NQ

Summary

The complainant requested to be provided with certain copies of legal advice obtained by the public authority. The public authority declined relying upon an exemption under section 42 of the Freedom of Information Act ("section 42") claiming legal professional privilege and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner has considered the public authority's file and the legal advice in question as a result of which he is satisfied that the public authority has properly applied section 42.

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 1 January 2005 the complainant requested the public authority to provide him with "*copies of the legal opinions you have obtained in relation to my employment with and dismissal from (...named party...) and the related disciplinary procedure and investigation*".

On 31 January 2005 the public authority responded declining to release the information relying upon the section 42 exemption.

On 8 February 2005 the complainant requested an internal review of the refusal.

On 18 April 2005 the public authority confirmed the internal review had taken place and that the original refusal had been upheld on the same ground.

The Investigation

Scope of the case

3. On 19 May 2005 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:

Whether the public authority had correctly applied the section 42 exemption.

Whether the internal review process had been completed within any appropriate required time limit.

The Commissioner will deal now with first part of the complaint the second aspect being considered under other matters at paragraph 25.

Chronology

4. On 5 July 2006 the Commissioner invited the public authority to make the relevant documentation available and to provide its explanation of the application of the exemption under section 42. At the same time the complainant was invited to provide certain background information.

The complainant responded on 7 July 2006, the public authority on 22 August 2006.

The public authority thereafter provided details of its internal review procedures.

The Commissioner has considered all of the documentation provided including copies of the legal advice.

Findings of fact

5. The Commissioner has reviewed the information provided in this case within the relevant background context.
6. In January 2003 the complainant contacted the Police Complaints Authority stating that he wished to complain about two police officers who had declined to record what the complainant believed to have been a crime committed against him by certain named parties under the Protection from Harassment Act 1997.

The Police Complaints Authority referred the matter to the public authority's professional standards unit. An officer ("the superintendent") from that unit subsequently visited the complainant at his home address and due to the complainant's ill health it was agreed that the superintendent would draft a statement which the complainant would then sign.

7. It was agreed that from the statement the superintendent would distil issues and using further material provided by the complainant thereafter seek a legal opinion as to whether the complainant's allegations against the named parties amounted

to an offence under the Protection from Harassment Act.

8. On 17 September 2003 the superintendent wrote to the complainant in the following terms

"You will recall that in my letters of 20 May and 2 September I advised you that I would seek legal advice as to whether your allegations amounted to a crime under the Protection from Harassment Act 1997 and whether the police officers were correct in failing to record your allegations as a crime.

I submitted your statement, telephone transcripts, correspondence between yourself and (...named party...) and copies of our correspondence to the comptroller and city solicitor for advice. That advice is now to hand and having considered the material the comptroller and city solicitor does not believe your allegations amount to a crime under the Protection from Harassment Act 1997. It therefore follows that the decision by the police officers not to record your allegations as a crime was appropriate".

9. There was no further substantive contact between the complainant and the public authority thereafter until the complainant by e-mail on 23 August 2004 requested that in the light of further information he was providing the public authority refer the matter back to its legal advisers.
10. On 2 December 2004 the superintendent wrote to the complainant confirming that further legal advice had been obtained. This however confirmed the earlier advice.

Analysis

11. The section 42 exemption applied by the public authority relates to information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. Such information is exempt information.
12. In general the principle 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 third parties if such communications or exchanges come into being for the purposes of preparing for litigation.

There are two separate categories within this privilege those being 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 is already in existence or which might be in contemplation.

13. Advice privilege relates to communications between a person and his lawyer provided that they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and obligations. In this case it is clear that the information in question relates to advice privilege.
14. The legal professional privilege exemption is class based. Therefore for the exemption to apply it is not necessary to demonstrate that any prejudice may occur to the professional legal adviser / client relationship if information is disclosed. Rather it is assumed that the disclosure of even quite trivial information might undermine the relationship of the lawyer and client.
15. However the exemption under section 42 is not an absolute exemption. Therefore where the information falls within the terms of the exemption as it does here, section 2 of the Act requires the Commissioner to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
16. The public authority in its initial refusal letter of 31 January 2005 accepted that factors in favour of disclosure included the transparency of its decision making process and the benefit to individuals of the provision to them of information of particular reference to them. However it considered that confidentiality between lawyer and client promoted respect for the rule of law by encouraging clients to seek legal advice. It allowed for full and frank exchanges between clients and their lawyers. Without confidentiality, clients might fear that anything they said to their lawyers, however sensitive or potentially damaging, could be revealed later. They might be deterred from seeking legal advice at all, or from disclosing all relevant material to their lawyers, or the advice given might not be as full and frank as it ought to be. In addition it pointed out that the legal advice in question remained current and might be relied upon by it or third parties until the possibility of further action no longer existed.

Similar arguments were referred to in its letter of 18 April 2005 confirming the upholding of the original refusal following review.

17. The complainant maintains that it is not sufficient for the public authority to attempt to rely upon general principles of exemption. Each case must be judged on its own individual merits that is to say on factors that relate to the particular case in question. The public authority he argues have merely cited general exemptions without applying them to the individual circumstances of the case.

In this case he argues that no harm would be caused to what he refers to as “the legal adviser / client” exemption. This is because the public authority obtained the legal advice effectively on his behalf based on information that he had provided.

18. The Commissioner does not accept the complainant’s argument. As already pointed out (paragraph 14) the legal professional privilege exemption is class based and it is accordingly not necessary to consider whether any harm would be caused.

19. The Commissioner accepts that the public authority obtained the legal advice based on information provided by the complainant. However this does not alter the fact that the public authority instructed its own legal advisers to provide the advice to it and it alone.
20. The Commissioner further notes that the public authority does not rely solely upon general arguments. In both its initial refusal letter of 31 January 2005 and its review letter of 18 April 2005 it took into account the public interest in maintaining the privilege until such time as the possibility of further legal action no longer existed. Such an issue is clearly relevant to this case when the terms of the legal advice sought are considered (paragraph 8).
21. The principle of legal professional privilege has been established by the Courts in recognition of the fact that there is an important public interest in a person being able to consult his lawyer in confidence. As Lord Gosforth CJ said in *R v Derby Magistrates' Court ex parte B*:

“The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests”.

The concept is based on the need to ensure that clients receive confidential and candid advice from their legal advisors after having full and frank discussions. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.

The Information Tribunal in its decision in *Bellamy v Information Commissioner* (appeal no. EA/2005/0023, FS0066313) stated in paragraph 35 that “...*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...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*”.

22. The Commissioner finds in this case that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

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

Steps Required

24. The Commissioner requires no steps to be taken.

Other matters

25. Although it does not form part of this Decision Notice as it falls outside the scope of the Commissioner's role as set out at paragraph 1, the Commissioner has considered as requested the second aspect of the complaint namely whether the internal review process was completed within any appropriate required time limit.
26. The Act is silent as regards a time scale for internal reviews. However the Secretary of State has issued a code of practice under section 45 of the Act which does provide guidance on the point and in particular indicates that public authorities should set their own target times for dealing with such procedures. Such target times should be reasonable and subject to regular review.
27. To ascertain whether the procedure has been undertaken within a reasonable time scale requires consideration of the review process undertaken.
28. The superintendent dealt with the initial request for information issuing the refusal letter on 31 January 2005.
29. On 8 February 2005 the internal review was requested and in response to concerns raised by the complainant the superintendent was able to advise him in correspondence dated 11 February 2005 that the review would be conducted by a senior officer who was not party to the original decision making process. The aim was to complete the review within 3 months though if this was not possible the complainant was advised that he would be contacted and advised accordingly.
30. The review was undertaken by the commander of the public authority. He did so with the benefit of the assistance of legal advice provided through the comptroller and city solicitor's office. The legal adviser involved from that office had not been a party to the original provision of legal advice or the initial decision making process.
31. The commander's decision to uphold the original refusal was communicated to the complainant in correspondence dated 18 April 2005. The review process was accordingly completed in a little over two months, some three weeks within the time limit originally intimated by the public authority.
32. The Commissioner feels in the circumstances that the internal review was undertaken in accordance with the code of practice and that the time taken was not unreasonable in all the circumstances.

Right of Appeal

33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

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 19th day of October 2006

Signed

**Graham Smith
Deputy Commissioner**

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

Relevant Statutory Obligations and Provisions under the Act

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 2(2)(b) 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 in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 42 provides that -

(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.

CODE OF PRACTICE
(Freedom of Information Act 2000, section 45)
**Guidance to public authorities as to the practice which it would
be desirable for them to follow in connection with the discharge
of their functions under
Part I of the Freedom of Information Act 2000**

Having consulted the Information Commissioner, this Code of Practice is issued by the Secretary of State for Constitutional Affairs under section 45 of the Freedom of Information Act 2000 (c.36) on 25 November 2004. The Code provides guidance to public authorities, as defined in the Act, as to the practice which it would, in the Secretary of State's opinion, be desirable for them to follow in connection with the discharge of their functions under Part I of the Act.

Laid before Parliament on 25 November 2004 pursuant to section 45(5) of the Freedom of Information Act 2000.

I Introduction

1. This Code of Practice provides guidance to public authorities as to the practice which it would, in the opinion of the Secretary of State for Constitutional Affairs, be desirable for them to follow in connection with the discharge of their functions under Part I (Access to information held by public authorities) of the Freedom of Information Act 2000 ("the Act").

Words and expressions used in this Code have the same meaning as the same words and expressions used in the Act.

VI Complaints procedure

36. Each public authority should have a procedure in place for dealing with complaints both in relation to its handling of requests for information. The same procedure could also usefully handle complaints in relation to the authority's publication scheme. If the complaints cannot be dealt with swiftly and satisfactorily on an informal basis, the public authority should inform persons if approached by them of the details of its internal complaints procedure, and how to contact the Information Commissioner, if the complainant wishes to write to him about the matter.
37. When communicating any decision made to refusing a request, in reliance on an exemption provision, public authorities are obliged, under section 17(7) of the Act notify the applicant of particulars of the procedure provided by the public authority for dealing with complaints (or to state that it does not have one). In doing so, they should provide full details of their own complaints procedure, including how

to make a complaint and inform the applicant of the right to complain to the Commissioner under section 50 if he or she is still dissatisfied following the authority's review.

38. Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint, as should any written communication from a person who considers that the authority is not complying with its publication scheme. These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application.
39. The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.
40. Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint.
41. In all cases, complaints should be acknowledged promptly and the complainant should be informed of the authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the applicant and explain the reason for the delay. The complainant should always be informed of the outcome of his or her complaint.
42. Authorities should set their own target times for dealing with complaints; these should be reasonable, and subject to regular review. Each public authority should publish its target times for determining complaints and information as to how successful it is with meeting those targets.
43. Records should be kept of all complaints and of their outcome. Authorities should have procedures in place for monitoring complaints and for reviewing, and, if necessary, amending, procedures for dealing with requests for information where such action is indicated by more than occasional reversals of initial decisions.
44. Where the outcome of a complaint is a decision that information should be disclosed which was previously withheld, the information in question should be disclosed as soon as practicable and the applicant should be informed how soon this will be.
45. Where the outcome of a complaint is that the procedures within an authority have not been properly followed by the authority's staff, the authority should apologise to the applicant. The authority should also take appropriate steps to prevent similar errors occurring in future.

46. Where the outcome of a complaint is that an initial decision to withhold information is upheld, or is otherwise in the authority's favour, the applicant

should be informed of his or her right to apply to the Commissioner, and be given details of how to make an application, for a decision on whether the request for information has been dealt with in accordance with the requirements of Part I of the Act.