

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 January 2007

Public Authority: Valuation Office Agency
Address: New Court
Carey Street
London WC2A 2JE

Summary

The complainant requested information held by the Valuation Office Agency about the legal basis and advice provided by the Treasury Solicitor regarding Forms of Return. The public authority confirmed that it held the requested information but was withholding it under section 42 of the Freedom of Information Act 2000 (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 legal advice in question and is satisfied that the public authority has applied section 42 correctly.

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 12 March 2005 the complainant requested the Treasury Solicitor to disclose: *"information I understand held by the Valuation Office Agency in respect of the legal basis and advice given by the Treasury Solicitor in respect of Forms of Return covered by Para 5 Schedule 9 Local Government Finance Act 1988 as amended ... and in particular advice relating to the services of such Forms of Return on Companies"*.
3. On 21 March 2005 the public authority responded. It explained that although the complainant had written to the Treasury Solicitor, any such advice would have been provided by the Inland Revenue (now HM Revenue and Customs) Solicitor's Office. The request had therefore been transferred to that public authority, which explained that as the complainant had raised the issue of

disclosure being in the public interest it would need to obtain Counsel's opinion and would: *"endeavour to respond within a reasonable time scale, say within 6 weeks of the date of this letter"*.

4. On 25 May 2005 the public authority responded declining to disclose the information relying upon the section 42 exemption. It referred to factors for non-disclosure of the information but did not discuss any factors in favour of disclosure.
5. On 1 June 2005 the complainant requested an internal review.
6. On 28 July 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

7. On 5 August 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 point:

That it was unreasonable that the public authority should seek to pursue Civil Penalties without making the legal advice available.

Chronology

8. On 30 August 2006 the Commissioner asked the public authority to provide him with the requested information and for clarification about which privilege was being claimed. The public authority responded but did not provide the requested information.
9. The Commissioner contacted the public authority subsequently and asked for the requested information. The information was eventually provided on the 23 October 2006 when it was also confirmed that the public authority was claiming advice privilege.
10. The Commissioner has considered all of the documentation and arguments provided by both parties including copies of the exempt information.

Analysis

11. The Commissioner will now deal with this case by considering the matter of a procedural breach and the public authority's use of the section 42 exemption including its application of the public interest test. A full text of the statutes referred to is contained in the legal annex.

Procedural matters

12. In its refusal notice of the 25 May 2005 the public authority stated that the information requested was: *“being withheld as it falls under the exemption in section 42 of the Freedom of Information Act 2000 (legal professional privilege)”*.
13. Section 17(3)(b) of the Act requires a public authority to state reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The public authority did not demonstrate any consideration of the public interest arguments in favour of disclosure.
14. Accordingly, the Commissioner finds that the public authority has failed to meet the obligation imposed upon it by section 17(3)(b) of the Act.

Exemption

15. The section 42 exemption applied by the public authority relates to information in respect to which a claim to legal professional privilege could be maintained. Such information is exempt information.
16. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges, between the client and his/her or its lawyers, and exchanges which contain or refer to legal advice which might be imparted to the client. It also includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.
17. There are two separate categories within this privilege known as advice privilege and litigation privilege.
18. Advice privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
19. Litigation privilege arises where litigation is contemplated or is in fact underway. Where this is the case privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of proposed or on-going litigation. This includes not only communications between a professional legal adviser and her/his client but also extends to communications with third parties and may cover a variety of documents.
20. The Commissioner has considered the requested information and it is clear that it relates to advice privilege. He is satisfied that it was legal advice provided to the public authority by its own lawyers and written for the sole purpose of providing advice in relation to the public authority's duties, rights and obligations under the Local Government Finance Act 1988 (as amended).

21. The legal professional privilege exemption is a class based exemption which means it is not necessary to demonstrate that any prejudice may occur to the professional legal adviser/client relationship if information is disclosed. Instead it is already assumed that the disclosure of information might undermine the relationship of the lawyer and client.
22. As this exemption is also a qualified exemption, 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.
23. The public interest in disclosing the requested information lies in enhancing accountability and transparency in actions and decisions being taken by the public authority.
24. In addition the Commissioner also considers that disclosure of the legal advice may further the public's understanding of the basis on which the public authority has produced its Forms of Return including the service of Forms of Returns on companies.
25. The public authority argued that disclosure of legal advice would prejudice its legal interests because:
 - its legal position could be challenged, which could lead to loss of resources if it had to defend these challenges
 - it may result in clients and lawyers either not making full and permanent records or making only partial records of legal advice given which in turn could lead to legally flawed decisions being made.

Therefore the public authority asserts that disclosure of the requested information would be contrary to the public interest as records should describe the process of decision making fully and should include any legal advice obtained.

26. The Commissioner accepts that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank disclosures. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.
27. In its decision in *Bellamy v Information Commissioner* (appeal no: EA/2005/0023, FS006313) the Information Tribunal 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*".

28. In the Commissioner's view in order to facilitate the performance of its public functions, it is important for the public authority to receive confidential and candid legal advice and engage in full and frank legal discussions with its legal adviser. Therefore the Commissioner is satisfied that in the particular circumstances of this case, the public interest in withholding the legal advice outweighs the public interest in disclosure.

The Decision

29. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The application of the section 42 exemption.
30. However the Commissioner has also decided that the public authority was in breach of section 17 as referred to in paragraphs 12–14.

Right of Appeal

31. 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@tribunals.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 22 day of January 2007

Signed

**Graham Smith
Deputy Commissioner**

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